THE SOUTHWESTERN POLITICAL SCIENCE QUARTERLY

VOLUME III

June, 1922—March, 1923

Austin, Texas
UNIVERSITY OF TEXAS
1923

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VOL. III JUNE, ...

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THE
SOUTHWESTERN POLITICAL SCIENCE
QUARTERLY

VOL. III JUNE, 1922 No. 1

The editors disclaim responsibility for views expressed by contributors to THE QUARTERLY

JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS*

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University of Oklahoma

It will be impossible within the limits of this paper to cover the subject assigned to me. The courts have already written volumes upon it, yet doubt and uncertainly remain.

Some principles are well settled, it is true. An appeal after one proper hearing is no necessary part of due process;[1] no administrative tribunal can finally determine its own jurisdiction; the exercise of discretion vested in such a tribunal will not be controlled in advance, by a court, nor will it be questioned afterwards except in clear cases of abuse. Questions of fact decided by administrative bodies will not, as a rule, be reviewed except to determine whether there was evidence upon which to base the finding; questions of law settled by such bodies are not usually disturbed except in cases of palpable error. Where there is a determination of questions of mixed law and fact within the jurisdiction of a commission it is difficult to state a rule because of the ease with which the question may be masked; and here the greatest play has been accorded for court review depending upon the interests involved and the character of the rights affected. Great finality is accorded administrative decisions in those fields in which the government has the greatest power, as, for instance, the collection of taxes or other revenue, and in the abatement of nuisances. Here administrative proceedings are not only accorded the greatest weight, but action may precede judicial investiga-

*Paper read at the Third Annual Meeting of the Southwestern Political Science Association, Norman, Oklahoma, March 25, 1922.

[1]Pittsburgh C. C. & St. L. Ry. v. Backus, 154 U. S. 421.

tion. In cases relating to rights under the postal service, in determinations as to the right to pensions and bounties, or in giving of land grants, and in immigration cases, finality is accorded administrative determinations, however summary the hearing, provided only it is fair.[2]

In the matter of utility regulation, on the other hand, the recent decision of the United States Supreme Court in the case of Ohio Valley Water Co. v. Ben Avon Borough et al.[3] has produced a very unsettling effect; and it is my purpose to discuss this case and its probable causes and consequences.

The Ben Avon case arose out of a commission rate fixed for the water company. The company appealed from the rate to the Superior Court which, after a review of all the evidence, determined that the valuation of the utility property by the Commission was too low and sent the case back to that body for a revision of the rate to meet the demands of the larger valuation found by the court. The supreme Court of the state reversed the decision of the Superior Court on the ground that the action of the Commission was legislative and discretionary as to the rate; it said: "The ascertainment of the fair value of the property for rate purposes is not a matter of formulas, but is a matter which calls for a sound and reasonable judgment upon a proper consideration of all the relevant facts."[4]

On writ of error to the United States Supreme Court it was held that, if the power of the Pennsylvania courts on appeal from the Commission under the law of that state did not include the power to use the court's independent judgment as to both law and facts, the order was void. The issue, therefore, was whether du process requires a court review of rate fixing and applying orders in which the court must be permitted to measure its independent judgment as

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[2]U. S. v. Ju Toy, 198 U. S. 253, 263; Kwock Jan Fat v. White, 253 U. S. 454, 464, immigration cases; Bates & Guild Co. v. Payne, 194 U. S. 106, and U. S. ex rel Milwaukee Social Democrat Pub. Co. v. Burleson, 41 Sup. Ct. Rep. 352; 255 U .S. 407, postoffice; Marquez v. Frisbie, 101 U. S. 473, public lands.

[3]1920, 253 U. S. 287, 64 L. ed. 908.

[4]260 Pa. 289, 103 Atl. 744.

to the fair valuation of the property against that of the legislative body.

A great deal of confusion has arisen in this class of cases out of a failure to distinguish clearly between two widely differing governmental acts, legislative or law-creating acts, and acts of adjudication. If this distinction is maintained with any degree of clearness, questions of procedure and right of review will not be so troublesome. It is well recognized today that rate making is a legislative function. But the reasonableness of a rate after it is made is a matter for judicial consideration, so far as it is capable of judicial ascertainment.

But is the finding of the fair value of the property of a utility for rate purposes the finding of a fact that a court can deal with upon any settled principles of judicial review? What is the value upon which a utility has any inherent right under the constitution to earn a fair return? Is it the original cost of construction and acquirement—the actual investment in dollars—or is it the market value of the property at the time of fixing the rate, or has it some other definite measure? General market value as property cannot be a test because utility property has no adequate market value. A railway right of way, consisting of narrow strips of land, is worthless except to the owner of the adjacent lands; depot and terminal sites have no general market value that can be measured because all adjacent values, especially in city wholesale districts, depend upon their remaining depots. Value based on earning capacity is not value for rate purposes, because it depends upon the rate. Our courts have repeatedly denied any right to investment cost; indeed, in the earliest cases the railroads contended for actual investment, as they offered to prove it, because at that time new processes and hard times had made railroad building much cheaper than when the roads in question were built. The courts denied this claim and placed their denial partly upon the practical difficulty of ever ascertaining the actual necessary cost, and partly upon the principle that a utility must be bound by a fall in the price of its

property, just as is any other property owner. Probably the practical difficulty of measuring the bona fide necessary investment was the controlling reason and the analogy to other property owners was merely an afterthought to bolster a rule already determined upon, but the situation resulted in a court theory that has tenaciously persisted, that what should be done is such cases is to protect vested rights in property.

In a later decade when costs of construction were again rising, the railroads invoked the previous decisions of the courts and insisted that they were entitled to be valued, not on the original investment but upon the present value of their property—thus an earlier rule of convenience was crystallized into a rule of thumb supported by court precedent and wearing the guise of a rule of law.

But within the past five years, with prices and costs again upon the decline, the courts have again become doubtful as to the legal valuation. But is it not apparent that there is no such thing as a legal valuation and that our courts have been, as one writer said,[5] "on a twenty-year search for a fact that does not exist" merely because they had presupposed a constitutional theory that must have the support of such a fact or fall? Analyze it as we may, the value of a utility's property rests wholly upon a basis of policy. When money is invested in public utility property there is a growing feeling among theorists as well as among practical statesmen that it is at that time devoted to a public use and is thenceforth withdrawn from private use or ordinary private ownership. It is no longer held for speculation as to the value of its component parts. It is no longer a thing to be bought and sold in the markets but something to be held for the use to which it has been devoted.

Take, for instance, the land of a railway company acquired for right of way or depot or yard sites. The power of condemnation was given to acquire lands for utility purposes.

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[5]Mr. Gerard C. Henderson, 33 Harvard Law Review, 1052.

Even though a utility does not condemn the needed land, it is helped by the fact that it can obtain it in the end from even an unwilling owner. Should the utility, obtaining the land for a public purpose and by means it could not have used but for the public purpose, be heard to say that it bought the land for merely private gain, for speculation in the land itself? The idea is preposterous; and granted the principle, it applies to all fixed utility investment. These properties are not in the market; they are definitely withdrawn from private use and their value depends not upon the chance to sell for speculative gain but upon its continued use under such rates as it shall be allowed. Here we approach the old vicious circle—the value depends upon the rate, should it determine the rate?

Again, suppose property should rise in value over a period of many years, what would be the chance for obtaining new capital for utility investment if we are confined to original investment as a necessary basis of valuation for rate purposes? It has been argued that utility valuations should roughly follow the value of other properties in order to recompense the utility for its loss of opportunity to engage in more speculative business during the inflation period. Also that if prices in general rise, the utility should have a greater return measured in dollars because of the diminished purchasing power of the dollars that do come in; while if prices generally fall, the utility should content itself with a smaller return because of the relatively large purchasing power of the dollars it is receiving on its investment; otherwise it would be taking an undue return in value from the public for its services. But all of this shows that there is no question of ascertainable exact fact or law to be found at all. There is only a question of adopting such a policy that, on the one hand the utility investments will not be discouraged; and, on the other, the public will not have to give too much of their substance for those utility services that are constantly becoming so much more important a part of the family budget. Such policies must come from the legislative side.

It is hardly fair to say, that, heretofore, the Supreme

Court has laid down as a matter of law ,as a necessary part of any decision, the rule that either original investment or reproduction cost were necessarily the constitutional basis of valuation. It is true that in Smyth v. Ames[6] the court does lay down a series of partly unrelated matters such as original cost of construction, the amount expended in permanent improvements, the amount and market value of its stocks and bonds, the present as compared with the original cost of construction, etc. But after all, the court was merely laying down a standard of fairness for fixing value as a discretionary legislative process—was merely saying that a value fixed by the legislature should bear some relation to some fact of present or past value or cost if it were to escape the stigma of being a merely arbitrary and tyrannical legislative abuse. Nothing more is suggested than a standard of justice and the court does not pretend to say that the condemnation analogy nor any fixed method of valuation applies as a matter of law in valuation cases. To say that the court had intended to lay down a workable rule of valuation in that case[7] would be as reasonable as to say one could deduce a man's weight from his height, the color of his eyebrows, and the maiden name of his maternal grandmother.

If it be true then that utility valuation is a matter of policy or fairness and not of exact fact or of law, what was back of the statement in the Ben Avon case that the state must provide for a submission of valuations to the independent judgment of a court whenever the utility raises the question of confiscatory rates as against a commission's determination? Did the court consider that it was merely requiring a justiciable question to be settled finally in a court or was it deliberately professing to assume active supervision of the legislative acts of commissions or consciously undertaking to amend or revise such legislation? The idea of due process does not require nor permit that courts entertain appeals from the legislative acts of com-

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[6]169 U. S. 466 (1898).

[7]Smyth v. Ames.

missions, or that any resort to the courts ever obtains against the making of law but only against its enforcement when that enforcement unduly interferes with property rights. Due process does affect legislative or policy determining action to this extent: that if it is capricious or arbitrary or without relation to public ends the courts will refuse to apply it where it conflicts with a right that would otherwise be recognized. But in judging an act for this purpose the court does not weigh its judgment against the legislative jugdment but merely determines whether reasonable men could reach such a conclusion as the legislature has done. Or as the court said in Rast v. Van Denman & Lewis Co.,[8] "The rights of review to be exerted by the courts only when the legislation is unreasonable or purely arbitrary." For as Mr. Justice Holmes said in Gray v. Taylor,[9] "It is not lightly to be supposed that a legislature is less faithful to its obligations than a court."

On the face of the matter there appears to be a failure of the court to distinguish between legislative and judicial acts for the purpose of review. It is true we do not have any very satisfactory distinction between the functions for all purposes and for all situations. Justice Field's distinction in the Sinking Fund cases[10] that judicial action determines what the law is and what the rights of the parties are with reference to transactions already had, while legislation provides a rule for the future, scarcely fits the case because it is hard to see the rule for the future in the preliminary fact of finding value. The suggestion that this is the settlement of a particular controversy and therefore judicial is equally unsatisfactory because that begs the whole question as to whether it was based upon a pre-existing right. Another suggested test is that the final act to be done would make the process legislative for it was certainly an act looking to a legislative determination. But looking

[8]240 U. S. at 368.
[9]227 U. S. 51, 56.
[10]99 U. S. 727, 761.

at the situation can we say that there is any rule of law governing valuation? The very nature of the utility value forbids the assumption—neither is it a question of exact fact susceptible of calculation. It remains, therefore, a matter of policy, an assigning of values on a basis of encouraging investment and serving public interest. Justice Brandeis, in his dissent, concurred in by Judges Clark and Holmes in the case under discussion, says:

> The Commission's order, although entered in a proceeding commenced upon due notice, conducted according to judicial practice, and participated in throughout by the company was a legislative order—*

the purpose of a review would be

> not to pass upon the relative weight of conflicting evidence—and to substitute therein the judgment of this court—but to ascertain whether a finding was unsupported by evidence, or whether evidence was properly admitted or excluded.†

The stand of the Supreme Court of Pennsylvania in this case that "the ascertainment of the fair value of the property, for rate making purposes, is not a matter of formulas, but is a matter which calls for the exercise of a sound and reasonable judgment upon a proper consideration of all the facts"[11] seems unanswerable. It is also interesting in connection with this case to note the four cases relied on by Mr. Justice McReynolds as precedents for the majority decision. They are: Missouri Pac. Ry. Co. v. Tucker, 230 U. S. 340, 347; Wadley Southern Ry. Co. v. Georgia 235 U. S. 651, 660, 661; Missouri vs. Chicago B. &. Q. Ry. Co., 241 U. S. 533,538; Oklahoma Operating Company vs. Love, 252 U. S. 331. In the first of these cases[12] the Kansas statute fixed the rate complained of by direct legislative act, but

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*Page 293.

†Page 298.

[11]260 Pa. 308, 103 Atl. 744.

[12]Mo. Pac. Ry. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 1509.

provided no machinery to test the rate and further provided that every carrier "which shall demand, exact or receive for such transportation or delivery any sum in excess of the rates hereby made lawful shall be liable to any person injured thereby in the sum of $500.00 as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable attorney's fee to be fixed by the court."[13]

The complaint of the railway company was that no other proceeding to test the validity of the rate was offered except the defense of the criminal action and that at a risk of enormous fines if penalties were enforced—because the railways could not refuse shipments and it was stated 10,000 shipments must be carried by the company during a single year. The court held the statute carrying such penalties and involving such possibilities to be invalid under the Fourteenth Amendment as placing too great a burden upon the defense of a claim of right by the railway and as unreasonable. On the question of confiscation the court says: "The validity of the rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state) and an inquiry as to that fact is a proper subject of judicial investigation." This case, therefore, does not support the theory of the majority in the Ben Avon case, viz., that in the hearing on rates by a court their untrammeled judgment must be had upon the question of valuation as a separate fact—indeed, it does not touch that point but is based directly upon the ground that the Kansas statute is so severe as to unfairly discourage a contest of the rate, whether based on jurisdictional or other grounds.

The second case relied on is Wadley Southern Railway vs. State of Georgia.[14] In this case, the order complained of was not a rate order at all, but was an order requiring railways to treat all connecting carriers alike, and required that no credit be given and that charges be paid in cash by all

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[13]Laws 1905, Chap. 353, p. 389.

[14]235 U. S. 651, 59 L. ed. 405.

without discrimination. After a hearing as to a violation of this requirement an order was made by the commission imposing a penalty of $1,000.00. It was alleged that the imposition of this penalty even though with a hearing before the commission, operated to unduly restrict the freedom of resort to the courts. The Court says: "—the right—to be secured in due process of law—is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection."

Again the point of decision assumed to be the gist of the Ben Avon case—viz., that in rate questions the court must put its judgment against that of the legislative body on the point of the sufficiency of the valuation—is not even remotely hinted at. All that is declared is that an administrative order requiring a railway to refrain from discriminating between connecting carriers in the matter of cash or credit payments, even though made after a commission hearing, is not due process where the procedure for the enforcement of the order is of such a nature as to discourage resort to the courts.

The next case relied on is Missouri v. C. B. & Q. Ry. Co.[15] The decision in this case is based on a question of procedure as to the effect of the dismissal without prejudice of a bill in equity. But Chief Justice White takes occasion to state certain principles relating to rate questions which he regards as fundamental. He says:

> In exerting the rate making power the rates cannot be made so low as to be confiscatory without violating the Constitution—that from the act of fixing railroad rates by law there resulted the duty to provide an opportunity for testing their repugnancy as a unit to the Constitution in case there was a charge that they were confiscatory.

It will be remembered that in the Ben Avon case the

[15] 241 U. S. 533, 538, 60 L. ed. 1148, 1154.

startling point was not that there should be a hearing on the question of constitutionality, but that on the question of valuation the judgment of the court should be weighed against that of the legislative body, a proposition which finds no necessary support in the dictum of Justice White in the case cited.

The fourth case relied on was Oklahoma Operating Co. v. Love.[16] In that case as the remedies in the state courts had been construed by the State Supreme Court it had appeared "that the only judicial review of an order fixing rates possible under the laws of the state was that arising in proceedings to punish for contempt. The Constitution endows the Commission with the powers of a court to enforce its orders by such proceedings. By boldly violating an order a party against whom it was directed may provoke a complaint and if the complaint results in a citation—he may justify before the commission by showing that the order violated was invalid, unjust, or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme Court. But the penalties which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and the most confident____Obviously a judicial review best by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates."

Here again we fail to find any support for the statement of the Ben Avon case that any provision for the enforcement of a rate is invalid unless a court is given the power to determine the question of confiscation "upon its independent judgment as to both law and facts" including, and here indeed chiefly, the adequacy of the valuation.

The Supreme Court had previously in the Chicago, M. &

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[16]252 U. S. 331, 64 L. ed. 596.

St. P. Ry. Co. v. Minnesota (ex rel. R. R. and Ware House Com.),[17] used language which might be given a variety of meaning. There the state statutes in regard to fixing rates as construed by the highest court of the State made the rates of the commission not merely *prima facie* reasonable but final and conclusive and neither contemplated nor allowed any issue to be made nor inquiry had as to their reasonableness in fact beyond such legislative investigation as the commission might make in fixing the rate. This statute as construed was held void under the Fourteenth Amendment as it allowed no inquiry judicial in nature at any point after the rate was fixed[18] and so does not touch the situation in the Ben Avon case.

On the other hand, in the San Diego case the Supreme Court of the United States says that "the courts cannot, after the Board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be nullified because the courts in a similar investigation have come to a different conclusion as to the reasonableness of the rate fixed. There must be actual fraud in fixing the rates or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing." Thus none of the cases cited to sustain the decision of the Supreme Court in the Ben Avon case raised the point on which the decision in that case rested, and the case stands alone as introducing the requirement that a court must weigh its judgment against the commission in a matter of legislative discretion.

Another point of uncertainty as to judicial review of administrative decisions is found in the vagueness of court opinions as to what will be considered a judicial review or as to what constitutes a "court" for the purposes of due process. Time forbids my going into this matter but some day we shall be obliged to blaze some trails through the wilderness of tribunals that have grown up like mushrooms in the last generation, and subject them to some

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[17]134 U. S. 418, 33 L. ed. 970 (1890).

[18]For this construction see San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed., 1154, 1158.

process of analysis and classification. What makes a court for the purpose of giving a hearing that will be due process and whose determination can be *res adjudicata* in a matter involving property and personal rights in cases where our constitutions do not make a jury trial necessary? Courts say that the test of a court is whether it can in a controversy or case make a binding decision which is *res adjudicata* for the subject involved; and again they say that nothing is *res adjudicata* unless it is the decision of a court. Many states permit the mingling of functions. The Supreme Court of Oklahoma is, under Section 20 of Article 9 of our Constitution, the supreme legislative body as to transportation and transmission company rates and, if a statute passed in 1919 is valid[10], for all rate regulation of all utilities, yet it is no less a court because of its legislative functions.

Is there then any test of what constitutes a court except the fiat of the legislature or constituional convention of a state? The United States Constitution does not require a state to separate judicial from other state functions, but it probably does require a tribunal fair, unbiased, and reasonably fitted to pass on the matter submitted to it in order that its decisions may be due process but does the affixing of the name court add anything to its potentialities? Modern conditions are so complex that the typical courts of our fathers cannot do all the work and do it well; too many diverse questions come up and need too many diverse talents and treatments for their solution. Even many of our private rights are undergoing modification or changing, because of new social and industrial and economic conditions which change public needs. We are going, therefore, to have in the future an increasing diversity of tribunals specially fitted to meet special needs and special situations often involving matters of private right. Must we let our court for the trial of jury cases at law pass on all the adjudications of these bodies for all future time? The Ben Avon case seems to require this even as to legislative acts.

The whole thing may be like the development of equity in

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[10]Session Laws, 1919, Chapter 52, section 3, page 87.

a former century—something new and permanent in the process of being added to our procedure—a recognition that courts as now constituted cannot do it all, just as commission legislation grows out of the fact that legislatures as now constituted cannot do all the legislating or do it well. So we must develop a set of new tribunals suited to new needs and give them a chance.

Courts, as we have seen, have not always been deciding law or mooted fact in the constitutional cases—rather they have been balancing interests and adjusting legislative policies. Their opportunity for this lies, as we have said, in the hazy notions prevalent as to what they are doing and their excuse, that inadequate agencies are really doing harm to private interests and to public utility interests, and this is doubtless true.

It has been partly because of legislative inefficiency and partly because of the vagueness of the concept of due process that the courts have premitted themselves or have been induced to assume such a control of legislative policies in the past. Lochner v. N. Y.[20] is a good instance of the court's going astray on the assumption that only things to which they were accustomed can be due process even when those things are economic or social policies. But, as Justice Holmes said in his dissent in that case: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."

It was this same species of court interference with legislative policies which brought out the storm of protest in the first decade of this century culminating in President Roosevelt's proposal to review court action by a popular referendum. And his proposal was one to which the courts could not logically object—they had undertaken to supervise the political or policy determining acts of the legislature—the constitutionally appointed body for handling questions of policy, they had officiously entered the political field, why not make them subject to the most intimate political check since they were already beyond bounds? The more recent

[20] 1905, 198 U. S. 45, 75.

expressions of the Supreme Court have seemed to show that they had abandoned, if they ever countenanced, open supervision of legislative action in the political field, and therefore, the new pronouncement of the Ben Avon case seems to be an instance of reverting to an older tendency—more than that the court is making itself a sort of superior administrative tribunal of legislative character and is to that extent abdicating its judicial role. But so long as administrative bodies are so poorly articulated and adjusted and so long as results are reached by them rather as a result of popular pressure than from a sense of deep public obligation in so many instances, we will have occasional court interference of the sort exemplified in the case under review. For courts furnish the conservative element in the state's machinery—they can with a degree of public acquiesence assume the role of guardian of private interests against even political abuses; and perhaps it is better so, for since they are conservative and the most trustworthy body in our plan of government their overstepping of bounds is least likely to produce evil consequences. But the unscientific system which invites such results must sooner or later give way to a system that recognizes the boundaries which differentiate legislative from judicial action. This ideal can never be fully realized and can be approached only as we develop a more scientific system of legislation and one based on a comprehensive regard for all the interests likely to be affected. And with this legislative attitude must be joined a greater care in the framing of our administrative tribunals and in the selection of their members.

THE POSITION OF RANCHING IN OUR NATIONAL ECONOMY[1]

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Definition

Ranching is an enterprise in which livestock, notably cattle, sheep and goats, but also horses, mules and swine in considerable numbers, are produced primarily by grazing upon natural vegetation rather than upon cultivated crops. Feeding on the ranch is merely incidental, and is practiced only to supplement the natural vegetation or to carry the livestock through periods of drouth. Ranching is distinguished from stock-farming in that the latter is an enterprise in which one grows either crops to be fed to livestock or livestock to consume the crops.

Ranching the Beginning of Civilization

Ranching has occupied a central position in the history of civilization. Originally it is said that man lived in little groups or tribes based on kinship. In that condition one may conceive of mankind subsisting entirely upon the natural products of the earth. The first step in the direction of improving natural production was when certain chieftains or ranchmen engaged in the pastoral industry. Citizenship emerged out of the tribal society for the first time when individuals for one reason or another broke away from their family groups and affiliated themselves with the

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[1]Paper read at the Third Annual Meeting of the Southwestern Political Science Association, Norman, Oklahoma, March 23, 1922. This paper is based upon "An Economic Study of a Typical Ranching Area on the Edwards Plateau of Texas," by B. Youngblood, Director, and A. B. Cox, Chief of the Division of Farm and Ranch Economics, Texas Agricultural Experiment Station, Agricultural and Mechanical College of Texas.

ranchmen as their chiefs. These cowboys and their chiefs, the ranchmen, constitute the first known organization for production.

As graziers became too numerous in a given section the ranchmen would move westward onto the frontier, leaving lesser ranchmen, farmers and villagers in their wake. This process was repeated until the white man crossed Europe and occupied the British Isles. Ranching was the prototype of feudalism, and the breaking down of feudalism gave rise to what we conceive of as democracy. It is interesting to note in passing that the English, Welch, Scotch and Irish came to this country to become noted as leading American ranchmen.

In the South ranching preceded the farmer and opened the way for him in passing from the Atlantic coast to Texas. In old Mexico, too, it led the way and was the first industry engaged in on the frontier. Sustenance received from ranching made possible the development of the mines, the farms and the missions, all the way from Vera Cruz to what is now California, New Mexico, Arizona and Texas.

Always occupying the frontier, it came to be a matter of common experience that ranching would give way to farming and make place for the settlements, the towns and cities. In view of the fact that farmers have been able to supplant the ranchmen it is no wonder that the American people have come to believe that ranching is a fleeting industry and that in due time it will cross the continent and be no more. It has been a passing industry in the past and will continue to pass on in the future until all the profitably tillable lands of the country are put under the plow. It is the purpose of this paper, however, to show that ranching now occupies the last American frontier, and, contrary to its previous history, it will not give way a great deal more to the farmer. On the contrary, it has reached its permanent abiding place, and so far as we are able to foretell the future, it appears that it will remain about where it is, as one of our permanent industries and shall never pass away from our vast areas of lands unsuited for cultivation.

The Respective Domains of the Farmer and the Grazier

So long as our population was small and lands were superabundant for every purpose, there was no great economic question as to the respective domains of the farmer and the ranchman. It was perfectly appropriate for the farmer to push the ranchman on to the west and to put into cultivation all the arable lands of the country. The question became an important issue for the first time when the farmer began to enter the semi-arid areas of the West and Southwest, and will continue to be a question until it is more definitely decided just how far into the dry country the farmer can go with the help of dry-farming methods and drouth-resistant crops. It is perfectly safe to say that the farmer at any time should stay within the bounds of profitably tillable lands. This is his proper domain.

Likewise it should go without saying that the grazier should occupy the lands suitable for grazing, but unsuitable for forestry, mining, irrigation, dry-farming, or other more intensive uses. That serious mistakes have been made in the past as to which is the domain of the farmer and which the domain of the ranchman, there is no doubt. The promise of dry-farming has in many cases imposed grossly upon the optimism of the dry-farmer. On the borderland between farming and ranching, from the Rio Grande to Canada, many thousands of men have homesteaded grazing lands with nothing as a result except disaster to themselves and their families and the destruction of the grazing industry in that section.

The question as to which is the appropriate domain of these two industries is likely to arise periodically with favorable years of rainfall wherever the land is level and fertile. It is fortunate for the country, therefore, that in the dry country we have enormous areas of land too rough, stony and broken to be turned by the plow. The citizens of the states wherein it is possible for the farmer to go too far into the grazing country should take it upon themselves to make it a matter of state policy to see that all successfully tillable lands are put into cultivation as economically needed

on the one hand, and that none of the agricultural submarginal lands are put under the plow on the other hand, for it is only possible to produce the greatest national product when the farmer and the ranchman alike are working on lands which are marginal, that is, profitable for their respective purposes.

In the past we have always allowed for a period of exploitation and destruction of natural resources. We have gone beyond the period, however, in which we can stand such losses. We have now entered upon an era in which strict economy must be practiced in order that stable conditions as between industry, commerce and agriculture on the one hand, and producer and consumer on the other, may be maintained. We are likely, however, to go on with the waste attending exploitation and destruction of natural resources until a better way is made clear to the American people. This is only possible through the instrumentality of research agencies to ferret out the facts and of constructive statesmanship to bring about appropriate State and National policies. It will prove far cheaper to society to endow these agencies with the necessary funds for research than to stand idly by looking to political relief in the absence of sufficient facts for political guidance.

Area and Extent of Grazing Lands in the United States

An idea of the importance of ranching in our national economy can be secured from the following figures as to the uses to which we put our lands. According to Baker and Strong,[2] we had in 1910 in the United States about 745 million acres of range land and unimproved pasture, or 39.3 per cent of the whole; about 478 million acres of improved land in farms, or 25.2 per cent; about 600 million acres of forest and wood land, or 31.5 per cent; about 40 million acres in towns, cities, roads, and so forth, or two per

[2] O. E. Baker and H. M. Strong, "Arable Land in the United States," Separate No. 771, from Yearbook of United States Department of Agriculture for 1918, Government Printing Office, Washington, D. C., 1918.

cent; and another 40 million acres in deserts, not grazed, or two per cent. It is estimated that at least two-thirds of the forest and wood lands of the country are also suitable for grazing. Adding this acreage to the range land and unimproved pasture we have the equivalent of about 1145 million acres of grazing land in the United States at the present time, or about 58 per cent of the landed area of the country.

The same authority also presents figures as to the potential areas to be devoted to the several uses as follows: When the range land and unimproved pasture and the forest and wood lands are trimmed to the limit to increase the area of cultivated lands, we will still have about 615 million acres of permanent range land in the United States, or about 32.4 per cent; about 850 million acres of improved land in farms, or 44.7 per cent; about 360 million acres of forest and wood land, or 18.9 per cent; 40 million acres in towns, cities, roads, and so forth, or about 2 per cent; and 38 million acres in deserts, not grazed, or nearly 2 per cent. Assuming again, that two-thirds of the potential forest and wood lands are suitable for grazing, we will have the equivalent of 855 million acres of grazing land in the United States, or 45 per cent of all kinds in the United States.

The Principal Livestock Products of the Western Seventeen Grazing States Compared with the Corresponding Products of the Remaining Farming States

For convenience we will refer to the former as "The West" and the latter as "The East." The line I have selected to divide the West from the East begins at the Canadian boundary and follows the eastern line of the Dakotas, Nebraska, Oklahoma and Texas, to the Gulf of Mexico. To be sure, some of the products mentioned are grown on stock-farms west of this line. It is doubtful, however, if as many heads of the livestock referred to are grown on the stock-farms west of this line as are grown principally by grazing on natural grasses east of it. One must not overlook the fact that in the rough country to the east of this

line, and throughout the South from Florida to Texas, large numbers of horses, cattle, sheep and swine are produced on native ranges with little if any feed from the farms. It is more probable, therefore, that we have mimimized, rather than magnified, the products of grazing in the United States.

It is most unfortunate for the purposes of this study that our census figures and government statistics generally fail to distinguish between the products of the grazing ranges and those of the farms of the country. As Dr. Raymond Pearl says, in his book "The Nation's Food," we can do no better than to refer to the products of grazing as the ". . . unknown X of pasturage."

As indicated in this paper, however, we are in position to gather such data from the studies of Baker & Strong and from the census figures, as we have done, to indicate something of the magnitude and importance of grazing in our national economy.

Table 1 shows the comparison of the East with the West as regards the production of beef cattle, horses, mules, sheep, wool, goats, mohair, and swine. With the exception of swine, these products are selected because they are the principal products of American ranches. A similar comparison might be made with other products, including minerals, oils, forest products, and the like, but that is beyond the purpose of this paper.

It is interesting to note that according to the census figures for 1920, less than 40 per cent of the beef cattle of the country is found in the East, whereas more than 60 per cent is found in the West.

Of horses, 57 per cent is found in the East, and 43 per cent in the West.

Of the mules of the country, 68 per cent is found in the East, and 32 per cent in the West.

Of sheep, 34 per cent is found in the East, and 66 per cent in the West.

Of the wool produced in 1919 and reported in the census figures for 1920, 31 per cent is produced in the East, and 69 per cent in the West.

Of goats, including of course Angora goats grown for the production of mohair, 27 per cent is found in the East, and 73 per cent in the West.

Of mohair, produced in 1919 and reported in the figures for 1920, only 3½ per cent is produced in the East, whereas 96½ per cent is produced in the West.

Of swine, primarily a stock-farming product, 77 per cent is produced in the East, while only 23 per cent is produced in the West.

Probably the figures for cattle and sheep detract from the record of the West and favor the East. Vast numbers of feeder steers and sheep are taken from the West in the spring of the year, grazed on the improved pastures of the Central West during the summer, and fed out in the feed lots of Iowa, Indiana, Illinois and Ohio during the fall and winter months. When the census is taken these steers and sheep are credited to the state where found, rather than the range state where they were produced.

This movement of feeders from the breeding ground of the West and Southwest to the Corn Belt is another instance of national economy. The ranges of the West and the Southwest have become the great breeding ground of the country for feeder cattle and sheep. Feeding must be done in the Corn Belt, which, by virtue of its grain and forage has become famous as the one great feeding ground of the country. It counts, therefore, for efficiency in the production of meats and fibres for the West to continue to give us numbers of sheep and cattle and for the Corn Belt to continue to feed them out. Feeding stuff in the range states is, relatively speaking, high in price, whereas in the Corn Belt it is abundant and relatively cheap. Moreover, the fact that the Corn Belt is producing such heavy yields of grain and forage creates a fundamental problem of soil maintenance and improvement. By feeding steers and sheep on the stock-farms of the Corn Belt, soil fertility may be maintained in the most efficient manner.

From the foregoing figures some idea can be gleaned as to the importance of grazing, or ranching, in our national

TABLE 1

The Principal Livestock Products of the Western Seventeen Grazing States Compared with the Corresponding Products of the Remaining Farming States

(Figures from U. S. Census of 1920)

	United States	The East		The West	
		Number	Per cent	Number	Per cent
Population.	105,710,620	85,767,089	81.13	19,943,531	18.87
Area in acres.....	1,903,215,360	741,904,000	38.98	1,161,311,360	61.02
Beef cattle, heads.....	35,288,100	13,792,188	39.08	21,495,912	60.92
Horses, heads.	19,767,161	11,274,391	57.04	8,492,770	42.96
Mules, heads.	5,432,391	3,694,253	68.00	1,738,138	32.00
Sheep, heads.	35,033,516	12,044,443	34.38	22,989,073	65.62
Wool, pounds.	228,795,354	71,628,804	31.31	157,166,550	68.69
Goats, heads.	3,458,925	940,338	27.19	2,518,587	72.81
Swine, heads.	59,346,409	235,279	3.46	6,573,611	96.54
Mohair, pounds.....	6,808,890	45,602,277	76.84	13,744,132	23.16

economy. Because of this importance, it is well for society to thoroughly realize that ranching, although it has truly passed through a number of remarkable evolutions, is not passing away, but that it is one of our permanently productive agricultural enterprises. It will be well, furthermore, for our society to make permanent provision for increasing the efficiency of the ranch or grazing business just as it is endeavoring to do for farming. The physical, biological and social sciences should all three be applied to the solution of our ranch problems, so that the carrying capacity and the carrying efficiency of our ranges may be increased to the highest possible normal, and there maintained so long as the conditions remain which make the grazing areas more suitable for livestock production than for any other economic purpose.

Moreover, our Bureau of the Census and of Crop Estimates should be encouraged to separate the figures for the products coming from our natural grasses from those indicating the products of our cultivated fields and improved pastures, so that in the future we may more intelligently decide which is the domain of the farmer and which is the domain of the ranchman, and with the help of the sciences make them both produce the greatest possible yield of food and raiment for the people, and also the greatest net product to the producers themselves.

MANDAMUS TO THE CHIEF EXECUTIVE OF THE STATE*

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The question, "Can the governor of a state be subjected to the compulsory process of mandamus, and thereby be compelled to perform the duties enjoined upon him by the laws and constitution of the state?" involves some very nice questions in government and constitutional law. There is an irreconcilable conflict of authority among the courts of the several states. Decisions have been repeatedly overruled with the change of personnel of the courts, and the courts in several states have been very reluctant to accept the views of their predecessors, showing that it is more a question of the theory of government held by the individual court than of law. Much of the conflict has been caused by the difference in construction of the various Constitutions of the several states, the governor in some states being an entirely different officer than the governor of other states. It has never been held in this country that the chief executive could be coerced by the judiciary in the performance of his discretionary, executive or political duties; but as regards the performance of ministerial and mandatory duties the authority is conflicting, perhaps with the weight in favor of the executive. The following states allow the courts to compel the governor to perform his sworn ministerial duties: Alabama, California, Colorado, Kansas, Kentucky, Maryland, Montana, Nebraska, Nevada, North Carolina, Ohio and Wyoming.[1]

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*Paper read at the Third Annual Meeting of the Southwestern Political Science Association, Norman, Oklahoma, March 25, 1922.

[1]For authorities see the following: Tenn R. R. Co. v. Moore, 36 Ala. 371; Middleton v. Low, 30 Cal. 596; Harpending v. Haight, 39 Cal. 189; Wright v. Nelson, 6 Ind. 496; Baker v. Kirk, 33 Ind. 517; Gray v. State, 72 Ind. 567; Magrauder v. Swann, 25 Md. 173; Groome v. Gwinn, 43 Md. 572; Chamberlain v. Sibley, 4 Minn. 309; Chumeraso v. Potts, 2 Mont. 242; Wall v. Blasdel, 4 Nev. 241; Cotton v. Ellis, 7

The following states have held that in no case can the chief executive be controlled in his duties, whatever their nature: Arkansas, Florida, Illinois, Maine, Michigan, Mississippi, Missouri, New York, South Dakota, Rhode Island, Tennessee, Massachusetts and Texas.[2]

In Minnesota, Louisiana, Georgia, Indiana and West Virginia there is abundant authority on either side and it is impossible to say what the law of these jurisdictions is.

Almost all of the cases are based upon grounds tending to sustain and strengthen our theory of government, very few being concerned with the personal rights or convenience of the governor himself. In reviewing these authorties it shall be my contention that the government, and incidentally the people, will be best subserved by permitting the courts to control the chief executive, at least in the performance of ministerial acts. This raises the question as to what is a ministerial duty, but that will not discussed in this paper, it being a question for the courts, and which the courts have ably disposed of in those jurisdictions where the governor is amendable to their jurisdiction.[3]

It would be well to consider the various grounds upon

Jones (NC) 545; State v. Chaise, 5 Oh. St. 528; Greenwood, etc. v. Routt, 17 Colo. 156; State v. Nichols, 7 So (La) 738; Bonner v. Pitts, 7 Ga. 473; Resley v. Farrell, 3 Pin (Wis) 393; Martin v. Ingram, 38 Kan. 641; Traynor v. Beckham, 116 Ky. 13; Cochran v. Beckham, 28 Ky. Law Rep. 370; W. C. Irvine v. B. B. Brooks, 14 Wyo. 393; State v. Thayer, 31 Nebr. 82; State v. Turner, 74 So. (Ala) 344; State v. Eberhart, 116 Minn 313; Barnard v. Taggart, 66 N. H. 362; Ellingham v. Dye, 99 N. E. (Ind) 1.

[2]For authorities see the following: Hawkins v. Governor, 1 Ark. 570; State v. Drew, 17 Fla. 67; Low v. Towns, 8 Ga. 360; People v. Bissell, 19 Ill. 229; People v. Yates, 40 Ill. 126; People v. Cullom, 100 Ill. 472; State v. Warmoth, 22 La Ann 1; Dennet v. Governor, 32 Me. 508; Rice v. Austin, 19 Minn. 74; Vicksburgh R. R. Co. v. Lowry, 61 Miss. 102; State v. Governor, 39 Mo. 388; State v. Price, 1 Dutcher (NJ) 331; Hartranft's Appeal, 85 Pa. St. 433; Mauran v. Smith, 8 R. I. 192; Turnpike Co. v. Brown, 8 Baxter (Tenn) 490; Sunderland v. Governor, 29 Mich. 320; State v. Stone, 120 Mo. 428.

[3]See 165 Pac. 419; 36 Ala. 371; 30 Cal. 596; 16 Cal. 11; 39 Cal. 189; 86 Pac. 1087; 17 Colo. 156; 116 Ky. 13; 28 Ky. Law Rep. 370; 25 Md. 173; 2 Mont. 242; 31 Nebr. 82; 14 Wyo. 393.

which the cases are based. The four leading cases upon the subject are Martin v. Ingram,[4] Harpending v. Haight,[5] Sunderland v. Governor,[6] State ex rel Robb v. Stone,[7] the first two being to permit the courts to control the governor and the last two not permitting the courts to interfere with that officer. These cases fairly represent the two lines of authority.

Sunderland v. Governor was an application for an order requiring the governor to show cause why he did not issue his certificate showing that certain canals had been constructed in conformity with the acts of Congress making a land grant for the same, and the acts of the legislature conferring the grant upon a corporation which the relator claims to represent. The court in its opinion used the following language:

> Where a duty is devolved upon the chief executive of the state rather than upon some inferior officer, it will be presumed to have been done because his superior judgment, discretion, and sense of responsibilty were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were put upon an officer chosen for inferior duties, and such duty can seldom be considered as merely ministerial. As regards the question of immunity from coercion by the courts, the governor of a state occupies a position analogous to the president of the Union, rather than to the heads of the executive departments of the federal government. As to all authority specifically confided to the governor, whether by the constitution or by statute, it will be presumed that reasons of a conclusive nature required it to be so confided as an authority properly and peculiarly, if not exclusively, pertaining to the executive department and therefore not subject to coercion by judicial process. And furthermore the jurisdiction to issue mandamus to the governor is in no

[4] 38 Kan., 641.
[5] 39 Cal., 189.
[6] 29 Mich., 320.
[7] 120 Mo., 428.

> wise affected by the fact that he voluntarily appears, and professes a willingness to abide the decision of the court. Our government is one whose powers have been carefully measured and apportioned between three distinct departments, which emanate alike the people, have powers alike limited by the Constitution and defined by the Constitution, are of equal dignity, and within their respective spheres of action are equally independent. One makes the laws and another applies the laws in contested cases, while a third must see that the laws are faithfully executed. This division is accepted as a necessity in all free government, and the very apportionment of powers to the three distinct departments should be understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties.

The court then discusses the system of checks and balances and says in conclusion,

> If any department abuses its powers the remedy is by impeachment and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the Constitution is its equal.

Michigan courts hold that neither the governor nor any of the state executive officers over whom the governor has any control, can be interferred with by the courts. In State ex rel Robb v. Stone,[8] the Missouri court in its opinion said, "Mandamus will not lie to compel the governor to perform an act or duty pertaining to his office, ministerial or political, or whether commanded by the Constitution or by some law passed on the subject, nor would the foregoing statement be changed by the fact that the governor voluntarily submitted himself to the jurisdiction of the court," and then followed substantially the reasoning of Sunderland v. Governor.

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[8]120 Mo., 428.

The courts of Arkansas and New Jersey base their decisions upon the ground that the governor is the head of a department of government and therefore he should be immune, although the other members of the same department are subject to be controlled by the judiciary. Having decided that as the governor is the head of a department, that they will not interfere with his activities, they explain their decision by saying that all of the duties imposed and enjoined upon the governor by the Constitution are necessarily strictly and exclusively executive, political or discretionary, else they would have been conferred upon some inferior officer of the executive department.[9]

The courts of Florida then extend the principle still further by holding that all duties conferred upon the governor by the Constitution or by the legislature must necessarily be executive or political, and not ministerial, upon the mere supposition that the act of conferring them upon the governor, renders them discretionary or executive, whatever the inherent nature or essence of the duty, and upon the further supposition that the governor embodies some superior fitness and ability to perform these duties, even though the duty is inherently ministerial in its characteristics.[10]

Other courts give various other reasons for refusing to accept jurisdiction over the governor, some refusing because they fear that they could not enforce their decree, and that they would be doing a vain and useless thing. Still others think that the plaintiff has another adequate remedy, i.e., impeachment; but of all these grounds the one the more often advanced is that of the Michigan Court, that the three departments of government are equal in dignity, each supreme in its own sphere, and that the court has no right to assert any authority over a department which the constitution has created as its equal. We must now examine these grounds and see if they are sound.

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[9]Hawkins v. Governor, 1 Ark, 570; State v. Price, 1 Dutcher (NJ) 331.

[10]State v. Drew, 17 Fla., 67.

In 6 L. R. A. (NS) 751 we find the following comment, "But the reason, if not the weight of authority, would seem to be with State Ex. Rel. Irvine v. Brooks upon the proposition that, as to duties of this character, the general principle of allowing relief against ministerial officers should apply, and the mere fact that it is the governor, against whom the relief is sought should not deter the courts from the exercise of their jurisdiction, since the authority of the courts is supreme in the determination of all legal questions, judicially submitted to them within their jurisdiction, and no one is exempted from the operation of the law, and the duty of faithfully executing the laws is solemnly enjoined upon the governor by his oath of office, and if the relief sought were refused, those persons whose rights had been invaded by executive neglect and refusal to act would very often be altogether without redress."

In Harpending v. Haight,[11] the court used the following language, "If it be conceded that the governor, because he is the chief executive of the department, may for that reason alone be exempted from judicial process, even when his duty is only ministerial, and in a case where a body of citizens have a vested right to have such duty performed, then the same exemption should be able to be set up by other officers of the executive department." In other words this California Court can see no distinction in the characteristics of a certain duty when it happens to be conferred upon the governor or when the same duty is conferred upon some inferior official. Justice Valentine speaking in Martin v. Ingram,[12] referring to this language of the California Court, said, "If the reasoning of the Court there be sound, and we think that it is sound, then it would follow that there is no distinction between an inferior executive officer and the governor in the performance of a certain ministerial duty."

There can be but two classes of decisions, consistently, that class where all of the executive officers are amenable to judicial process, and that class where none of the execu-

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[11]39 Cal., 189.
[12]38 Kan, 641.

tive officers are amenable to judicial process. Michigan is the only state where all of the executive officers of the state enjoy this immunity with the governor. Justice Fields in Middleton v. Low,[13] supplements the above argument by saying, "No officer however high is above the law, and when duties are imposed upon him in regard to which he has no discretion, and in the execution of which individuals have a direct pecuniary interest, and there is no other plain, speedy, and adequate remedy, he should be required to perform these duties by the compulsory process of mandamus. Though it is not to be supposed that the highest executive officer of the state, acting under his oath to support the constitution and laws, would refuse to perform a duty which the highest tribunal had imposed upon him by virtue of the constitution or those laws."

Chief Justice Marshall in the famous case of Marbury v. Madison,[14] said, "It is not the office of the person to whom the writ is directed but the nature of the thing to be done, that the propriety or the impropriety of issuing mandamus is to be determined." The court in Martin v. Ingram, cited these words of the learned Chief Justice with approval and drew the following conclusion from them. Quoting from the opinion of Justice Valentine,

> We do not contend that any court ever attempts by either injunction or mandamus or by any other action or proceedings to control legislative, executive or judicial discretion; but the place where the courts will act are those cases where the acts to be done are ministerial, and the ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his judgment or opinion concerning the propriety or the impropriety of the thing to be performed. Hence many of the cases cited to show that the governor cannot be controlled in a particular instance under con-

[13] 30 Cal., 596.

[14] 1 Cranch 137, 2 Law Ed. 60.

> sideration, are not in conflict with those decisions which hold otherwise, for many of such cases were decided upon the theory that the courts were asked to control executive or political discretion. If we should deduct all of those cases decided upon the theory that the court was asked discretionary action, and if we were to disregard all the dicta of those cases, and thereby leave only those cases which necessarily included a decision, and held that the governor could not in any case be controlled, then the weight of judicial authority would probably be that the courts could control any ministerial duty imposed upon the governor by law.

If this reasoning is sound, when duties are conferred upon the chief executive, why would it not also be true when they are conferred upon any other member of the executive department? Is not any power substantially the same wherever it is placed? Judicial power in the hands of a justice of the peace is substantially the same as it is when placed in the hands of the Supreme Court. Suppose that the duty in question is in its very nature and character, nothing more than the purest ministerial duty, and contains no element of judgment or discretion, and is in no way connected with the executive, and is such a duty as might have been conferred upon any citizen of the state, why then should it be transformed into an executive, political, or discretionary duty by the mere fact that it happened to be conferred upon the governor? Why is it not still a ministerial duty? The courts of Michigan and Missouri say not because if it were, it would have been enjoined upon some inferior officer, and that really it does not matter because the court cannot encroach upon the zone of the executive. But can we accede to this argument? It is true that the courts with certain exceptions cannot interfere with the duties of the other departments of government, nor the other departments interfere with the courts, but it would be far wrong to say that they are entirely independent and separate from each other, or that in certain instances one cannot exercise a certain control over the others. Most of the jurisdiction of the courts, and all of their procedure,

is prescribed by the legislature. Most of the duties of the governor are prescribed by the legislature, and the legislature may impeach the governor. The governor in turn may convene the legislature at his will, and may veto any bill which they pass. The courts may pass upon and construe all of the acts of the legislature, whether or not they have been signed by the governor, and may hold them to be good or bad according to their construction of the constitution. The courts may determine that a supposed member of the legislature is not a member, by deciding that he has no district. The courts may pass upon the validity of the acts of the governor, and it is said in Martin V. Ingram that the courts have the power to compel the governor to attend court as a witness, and if they do have this power, then they have the power to imprison him if he disobeys. This would be an interference by the courts which would render the executive unable to perform his official duties.

Considering all of these facts it will be seen that no department of government is entirely independent, each must co-operate with the others, but still each is in a measure dependent on the others. The courts are the only tribunals created by the constitution to construe the law, and yet the courts are dependent for their physical existence upon the other branches. No branch of the government should cease to perform its duty for fear that another branch might render its acts nugatory, or for fear that its acts might affect the status of some other department. In State v. Eberhart,[15] it is said, much controversy has arisen over the difficulty of distinguishing between the so-called political duties or executive duties and those which must be performed in a certain manner. It has been argued that the court might not be able to enforce its decree, but the jurisdiction of the court does not rest on its physical ability to enforce the decree, but depends upon the right of the court to hear the controversy. The governor under his oath of office, swore to perform these duties, and it is not to be presumed that the governor would refuse to perform duties

[15]116 Minn., 313.

which the court of last resort declares to be imposed upon him.

The legislature when passing laws is supreme in its sphere and the other departments must obey. The courts are supreme when construing the laws and their construction must be taken. When enforcing the law the executive is supreme and the others must obey. Each branch is supreme in its own sphere, but outside of its sphere it is weak and must obey. But it should be here noted in connection that the executive can enforce the laws only as the legislature has enacted them, and as the courts have construed them, and the question might be asked, "What right has the executive to refuse to enforce the constitution and laws as the people, and the legislature have made them, and as the courts have construed them?" In construing a constitution, we must have regard to the institutions prevailing at the time of the adoption of the constitution, and which the constitution was designed to correct; and we must see that our construction of the constitution does correct these evils. The citizen of the United States is upon an individualistic basis, put on that basis by our constitution and supported there by the system of checks and balances, which is embraced in our fundamental theory of governments. The rule is well stated in State v. Nash,[16] thus: "The legislative, executive and judicial departments of the State government are not so absolutely distinct that an arbitrary exercise of power, or what is the same, an arbitrary refusal to exercise power, could not be checked or opposed by either of the other departments. Such a theory is opposed to the principle of checks and balances upon which the Federal and State constitutions have been framed. From this we conclude that a certain control over the governor is necessary to the preservation of private rights." And if we look again to Marbury v. Madison, we find that Chief Justice Marshall uses the following language, "When the Legislature proceeds to impose on the executive officer, duties which he is peremptorily ordered to perform, when the

[16]66 Ohio St.

rights of individuals are dependent on the act, that officer is so far the officer of the people and of the law that he cannot at his discretion sport away the rights of the people."

The Federal courts have frequently dealt with governors as members ex-officio of state boards.[17] The attitude of the Federal courts is well expressed by the court in Kimberlin v. Commissioners[18] as follows, "(Speaking of mandatory duties) * * * an executive has no discretion as to whether he will perform or not perform any of these duties. They are mandatory to him and are in the interest of the public and the public has a right to have them performed. It is not within the scope of mandamus to coerce an executive in the discharge of a duty involving discretion further than to direct him to act."[19]

It would doubtless be interesting to investigate the state of the law on this question in Oklahoma. The constitutional duties, powers and privileges of the governor of the State of Oklahoma are set out in the first fourteen sections of Article VI of the Constitution. Section 8, Article VI specifically says, "The governor shall cause the laws of the State to be faithfully executed." Cameron v. Parker[20] says that it is the duty of the governor to see that the laws are faithfully executed, and he is responsible to the people for the faithful execution of his high office, and whether wisely or unwisely administered, the source of the responsibility is the same. And yet in spite of the attitude taken in this

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[17]Davis v. Gray, 16 Wall 203; Board of Liquidation v. McComb, 92 U. S. 531; Rolston v. Missouri Fund Commissioners, 120 U. S. 390; Pennoyer v. McConnaughty, 140 U. S. 1.

[18]104 Federal, 653.

[19]See Marbury v. Madison, 1 Cranch, 137, 2 Law Ed. 60; Kendall v. U. S., 12 Pet. 524; U. S. v. Schurz, 102 U S. 378; Butterworth v. Hoe, 112 U. S. 50; Decatur v. Paulding, 14 Pet. 497; U. S. v. Black, 128 U. S. 40; U. S. v. Guthrie, 17 How. 284; Commissioners v. Whiteley, 4 Wall 522; Georgia v. Stanton, 6 Wall 50; Gaines v. Thompson, 7 Wall 347; U. S. v. Windom, 137 U. S. 636; U. S. v. Blaine, 139 U. S. 306; U. S. v. Lamont, 155 U. S. 303; 19 American & English Encyclopedia, 372.

[20]2 Okla. 277.

early case, in view of the later Oklahoma cases I doubt seriously whether the minority argument would appeal to the Supreme Court of the State of Oklahoma.

In Norris v. Cross, Sec'y of State,[21] decided in 1909, the court laid down a strong dictum saying, "A writ of mandamus may lawfully issue from a court having jurisdiction to compel an executive officer to perform a mere ministerial act, which does not call for the exercise of his judgment or discretion, but which the law gives him the power, and imposes upon him the duty to do, and a writ of mandamus may lawfully issue to compel an executive officer to act and decide, even though his act and decision involve the exercise of his discretion, but it must not direct in what manner he must decide." The Oklahoma court then cites Cooley on Constitutional Limitations,[22] as follows: "If directions are given as to the time and mode of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised, and that manner only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end, especially when that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated and leave as little as possible to implication."

From the demeanor of the court in this case it would be fair to say that they had the governor in mind as well as the inferior executive officers. But what ever the attitude the court did have in this case was certainly overruled in 1910 by the case of State ex rel Att'y General v. Huston[23] Judge, in which the court refused to enjoin the governor from removing the seat of government from Guthrie to Oklahoma City, the question of jurisdiction being directly raised. A few months later the case of City of Oklahoma

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[21]25 Okla. 287.
[22]7th Ed., p. 114.
[23]27 Okla. 606.

City v. Haskell,[24] was decided on the authority of the above mentioned case, the court saying specifically in these two cases that they had no jurisdiction of the governor to compel him to perform even a ministerial duty. In State ex rel Dunlop, Treasurer, v. Cruce et al,[25] decided in 1912, in an action of mandamus against the governor, state auditor, secretary of state and two other state officers, who together constituted the Board of Commissioners of the Land Office, the court held that they had jurisdiction to compel this board to act according to law, even though the governor was ex-officio a member thereof, but further held that they had no jurisdiction over the governor by himself. This decision is explained on the ground that the other members of the board, exclusive of the governor, constituted a majority thereof, so they were in fact not coercing the governor.

Molacek v. White,[26] decided in 1912, also declared in a dictum that when a discretion is vested in a public officer, the court can by mandamus, compel him to exercise that discretion but will not direct how he will act or what judgment or conclusions shall be reached. It is doubtful if this dictum contemplated the governor. State ex rel Freeling v. Lyon, Sec'y of State,[27] decided in 1917 that a writ of mandamus may lawfully issue from a court having jurisdiction, to compel an executive officer to perform a ministerial duty which the law had imposed upon him. As this suit was against the secretary of state it is impossible to say whether the dictum contemplated the governor or not. In the case of City of Pond Creek v. Haskell,[28] the court heard a suit to enjoin the governor from performing a sworn duty, and the question of jurisdiction was not raised. Upon authority of that case the District Court in Noble State Bank v. Haskell,[29] sustained an injunction against the gov-

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[24] 27 Okla. 495.
[25] 31 Okla. 486.
[26] 31 Okla. 693.
[27] 63 Okla. 285.
[28] 21 Okla. 711.
[29] 22 Okla. 48.

ernor which was reversed in the Supreme Court but without the question of jurisdiction of the court being raised.[30]

If the situation in which the governor was asked to be compelled to perform a mere ministerial duty was presented to the Oklahoma court today, they could decide either way and still follow the decisions laid down by their predecessors in the past fifteen years. If the governor as a member of a state board is subject to the jurisdiction of the courts, then why not as an individual public officer? If the court will hear a case to enjoin the governor from performing his sworn duties, then why not to compel him to perform the duties imposed upon him by the constitution and laws of this state? The question being more one of individual political views, than it is of law, perhaps our Supreme Court, with the recent change of personnel, would follow the views of our sister states of Kansas and California.

But however the Oklahoma Court would rule on this question, I feel that Moses in his book on Mandamus (p. 82) has stated the conclusion correctly, "The better doctrine seems to be that the governor is not an exception to the general rule that all public officers may by mandamus be compelled to perform an act clearly defined and enjoined by the law and which is merely ministerial in its nature and neither involves or leaves any alternative."

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[30]A similar case is 24 Okla. 70.

DIVISION OF LATIN-AMERICAN AFFAIRS

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THE UNITED STATES AND THE ESTABLISHMENT OF THE REPUBLIC OF BRAZIL

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The relations of the United States and Brazil have been more harmonious, perhaps, than those of any other two American states. The United States was the first country to recognize the independence of Brazil, and the latter was the first of the South American states to signify its approval of and adhesion to the Monroe Doctrine. The friendship thus begun has continued with little interruption until the present day. At first thought, this would seem all the more remarkable since during the most of this long period Brazil was ruled by a monarchy. In reality, however, the character of the Brazilian monarchs, particularly that of Dom Pedro II., and the order and stability which the monarchical form of government gave Brazil have tended to promote rather than hinder the development of friendly intercourse between these two important American states. A survey of public opinion in the United States regarding Dom Pedro II. will reveal remarkable uniformity of admiration and praise.

The last of the Brazilian emperors had scarcely attained his thirty-first year when he was made honorary member of the New York Historical Society, while an address given before that society somewhat later contained the assertion that "Dom Pedro, by his character and his taste, application, and acquisitions in literature and science, ascends from his mere fortuitous position as an Emperor, and takes his place in the world as a man."[1] The great scientist Agassiz seems

[1]D. P. Kidder and J. C. Fletcher, *Brazil and the Brazilians* (Philadelphia, 1857), Chap. XIII.

to have thought highly of the Emperor, and Mrs. Agassiz records with evident pride the story of their visit to the capital of Brazil.[2] James R. Partridge, who represented the United States at the Brazilian court in the seventies, spoke of Dom Pedro in the following enthusiastic manner:

> The Emperor impressed me in every way as completely entitled to the reputation and popularity he has . . . with all who have ever approached or known him. To the advantages of a fine person, a dignified presence, and most affable address, without the least parade . . . he adds the solid things of admirable good sense, capacity, and knowledge . . . He certainly appeared to me to be the best thing I have seen in Brazil.[3]

The visit of Dom Pedro to the United States in 1876 attracted considerable attention, and furnished occasion for his election to membership in the National Geographical Society and the issuance of a brief biographical sketch in so dignified a publication as the annual report of the Smithsonian Institution.[4] His presence at the Philadelphia Exposition, moreover, gave Bell's telephone an opportune publicity which probably has meant much for the progress of that modern convenience.[5]

Four years later another enthusiastic North American minister at Rio spoke of His Majesty in most complimentary terms:

> The Emperor is a man of large views and fine temper. Among the rulers of the world today, I do not know of one who combines more of the

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[2]See Professor and Mrs. Louis Agassiz, *A Journey in Brazil* (Boston, 1871).

[3]*Papers Relating to the Foreign Relations of the United States* (1872), pp. 94-95.

[4]The Smithsonian Institution, *Annual Report* (1876), p. 173 ff.; Frank Vincent, *Around and About South America* (New York, 1895), p. 253. Note also Vincent's dedication.

[5]*The Literary Digest*, January 8, 1921, p. 30, quoting F. H. Sweet in *Power Plant Engineering*, gives an interesting account of the Emperor and the telephone.

> qualities which constitute a good sovereign. He is a statesman . . . he is a man of generous nature, he desires to promote the happiness of his people, and he comprehends the embarrassments that surround his government.[6]

The deposition of the aged Emperor in 1889 gave occasion for the fullest expression of American sentiment regarding him. If the utterances of the press may be taken as sincere, a good portion of the editors of the country seem to have been in doubt for a moment whether to congratulate Brazil for having set up a republic or to condole with the country on having deprived itself of the services and presence of so great a ruler and man. This attitude may be clearly seen in the following quotations taken from the leading contemporary newspapers:

> It is a matter of great regret that the aged Emperor should be driven forth at this last hour of his life. The republic would have come naturally upon his death as a protest against the beliefs and projects of his daughter and her profligate husband; but now it seems almost like a cruel anticipation. The Liberals of Brazil, however, if it shall prove to be the fact that they have overthrown the Government to gain a just freedom, can certainly not be denied our sympathy and applause; and still, with Dom Pedro before us, it is with only half our heart that we can cry "A long life to the republic."[7]

> While the world regards Dom Pedro with affectionate admiration, it can not help admitting that the inevitable has come to pass. All will regret, however, that the hour of the Brazilian Republic has struck during the life-time of the noble, progressive, and lovable Dom Pedro.[8]

> The people of this country can not regard with disfavor any movement of the people of another

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[6] *Papers Relating to the Foreign Relations of the United States* (1880), p. 97ff.

[7] New York *Independent*, November 21, 1889.

[8] The Chicago *News*, *November* 18, 1889.

> country to set up a republican form of government upon the ruins of a monarchical one. But this Brazilian movement is as yet incomplete; it is not even known whether the people or their self-constituted leaders, supported by the army, have effected the change of government. Even if, however, the revolution was [sic] wholly popular, and an inspiration of the entire people, here in the United States, in this city, where the Emperor was so well known and honored, there will still be regrets that he was forced to resign his great office.[9]
>
> It now belongs to the Brazilians to show themselves equal to the responsibilities of their new situation. What they will make of their opportunities time will determine. Meanwhile the rank in history of their late monarch, as a patriot and statesman, is secure, and Dom Pedro carries with him into his retirement the regrets and good wishes of the civilized world.[10]

Somewhat different in tone but none the less laudatory are the following expressions:

> Dom Pedro was one of the best, most liberal, and most progressive emperors that ever ruled. But the system of which he was the head was wrong, and it had to go before the advance of liberty and republicanism.[11]
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> Among all the "monarchs retired from business," Dom Pedro, of Brazil, is one of the best . . . He was not so much a strong man as a kindly man, seeking more the good of his people than the protection of his throne . . .[12]

The New York *Tribune* saw in the proposed compensation to the Emperor not only a wise political move but an act of justice to a well deserving ruler:

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[9]The Philadelphia *Ledger*, November 20, 1889.
[10]The Washington *Post*, November 20, 1889.
[11]The Baltimore *American*, November 20, 1889.
[12]The Baltimore *Sun*, November 19, 1889.

> Dethronement with compensation on a scale that proves that a republic is not ungrateful to a high-minded and progressive sovereign is hailed with satisfaction throughout Brazil. It is an anomaly in the annals of revolution, for kings are ordinarily lucky if they escape with their lives; but, under the circumstances, it is a just and equitable arrangement. The Emperor did not deserve to be dismissed like a lackey. He has gone out like a prince loaded with benefaction from a people whose quarrel was not with him, but with the monarchical system.[13]

The placidly optimistic view assumed by the Indianapolis *Sentinel* may perhaps not unfittingly be quoted as a sensible and wholesome attitude regarding the whole affair:

> The new *regime* involves little, really, but a change of external forms. Brazil has long been one of the freest countries on the globe—a republic really in everything but the name. The occupant of the imperial throne, too, was a republican at heart, and perhaps he will not repine greatly that the people to whom he is so warmly devoted have cast off, while he is in the flesh to see, the imperial robes that hung so awkwardly upon them.[14]

When the Brazilian revolution was discussed in the Congress of the United States in connection with a resolution proposing immediate recognition of the new republic, not even the most radical anti-monarchists indulged in severe censure of Dom Pedro. In fact, Morgan of Alabama, who introduced the resolution, made it clear that there was not

> slightest criticism . . . against the conduct of that patriotic and eminent man . . . who has been deposed from the imperial throne of that state. His methods of government, his fondness for his peo-

[13]November 19, 1889.

[14]November 18, 1889. For comments of the press of the United States on the general subject of the revolution in Brazil, see *Public Opinion*, VIII (November 23, 1889), p. 159ff.

> ple, his attachment to liberal institutions, his concessions on all occasions to . . . the people themselves have been so conspicuous that our people have . . . formed for him a more distinct and a higher personal attachment than they have ever felt for any emperor who (has) existed since our history begun (sic).[15]

And Sherman of Ohio, the most influential opponent of a hasty recognition of the newly established government of Brazil declared that he was actuated in part by

> a feeling of respect for one of the most distinguished men of our century, a man who, though an emperor, never exercised powers as great as our President; an emperor who was always willing to yield to the will of his subjects; an emperor who never did an unkind act, and in his long reign was a more thorough democrat . . . than any emperor who ever before in the history of the world held that rank.[16]

But the republican ardor of the people of the United States was in reality not cooled by their admiration for the last American emperor. To many the pacific fashion in which Dom Pedro abdicated seemed to indicate a voluntary surrender to what he conceived to be the will of the people, and his departure from Rio de Janeiro signified a deliberate abandonment of all claims of the House of Braganza to Brazil. If hereafter Dom Pedro or any other member of that House should decide to re-assert those claims, the ardent republicans of the United States were inclined to assume that they would do so under European persuasion or pressure and that they could only succeed in recovering the lost American empire with the aid of the European powers. Such persuasion, pressure, or assistance these republicans professed to consider a violation of the Monroe Doctrine.

This fear of European intervention and preference for republican institutions, even in a case where the choice was

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[15]United States *Congressional Record*, 51 Cong., 1 Sess., p. 313.
[16]*Ibid.*, p. 316.

between a republic and one of the best of monarchies, tended to hasten recognition of the new order in Brazil. Another consideration which urged this policy was a desire to secure and retain the friendship and the markets of the largest and most populous Hispanic American state. Consequently, as soon as news of the revolution reached Washington the minister of the United States in Brazil was instructed to maintain diplomatic relations with the provisional government. Moreover, a few days later he was directed to give the republic "a cordial and formal recognition" as soon as the majority of the people of Brazil signified their acceptance of the new regime.[17]

The proposed delay in formal recognition was deemed by the administration a wise precaution in view of the fact that such a step, if taken before the real nature of the revolt had become manifest, might succeed only in strengthening a military despotism whereas its true design would be to advance the cause of popular government in the New World. Yet President Harrison's announcement of his policy to Congress occasioned a somewhat vigorous attempt on the part of aggressive members of the democratic party to force the executive to move more rapidly. They argued that immediate recognition would strengthen the hands of the republicans of Brazil and do much toward discouraging any designs of interference which might be entertained in Europe. The friends of the administration in Congress were able to delay precipitate action, however.[18]

With reference to this policy public opinion was divided, but apparently the majority was in accord with the administration; and although decided partisan coloring may be detected in the press, both parties made it clear that they had the true interests of the Brazilian people at heart. A few quotations will set forth the various motives and cross currents which were operating at the time.

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[17] *Papers Relating to the Foreign Relations of the United States* (1889), pp. 61-63.

[18] For the discussions and procedure of Congress, see *Congressional Record*, 51 Cong., 1 sess., pp. 216, 313ff., 323, 871, passim.

Among the newspapers which advocated immediate recognition were the New York *World*, the Indianapolis *Sentinel*, the Savannah *News*, the New Orleans *Picayune*, the Atlanta *Constitution*, and the Omaha *Bee*. The following excerpts will reveal their attitude:

> The United States Government recognized the republic of France within a few hours after it was proclaimed . . . in 1870. It recognized in 1873 the Spanish Republic on the very day that Amadeus was kicked off his throne. And yet the Republican statesmen in Washington insist that the Brazilians must hold an election before it can be determined that their republic is entitled to our recognition. Encouraged by this cowardly policy the reactionists of Brazil are trying to stifle the republic and restore the empire. What a sneaking, pottering, cowardly republic we are having under the rule of the Republican plutocracy.[19]

> What hope and good cheer a prompt and cordial recognition of the new republic by the United States would have sent to the hearts of the lovers of freedom the world over! What an electric thrill the presence of half a dozen American men-of-war in the harbor of Rio Janeiro at this moment would give to republicans and democrats all around the globe! And what a tremendous and decisive significance it would have for kings and their ministers everywhere! But Mr. Harrison and Mr. Blaine and the Republican Senators say we must not pay any attention to the new republic. We must wait until the people of Brazil have formally given it their adherence. We must wait until his imperial majesty, the Czar of Russia, and her royal majesty, the Queen of England, and his imperial majesty, the Emperor of Germany, and all the rest of their . . . majesties, have concluded that "the jig is all up" with the divine right in the New World, and have condescended to permit the Brazilians to try governing themselves. The attitude of the Government at Washington in this matter is enough to make every patriotic American hang his

[19]The New York *World* (Democratic), December 26, 1889.

head with shame. If the Republic of Brazil falls, it will be because the United States withholds its recognition.—Oh, for one week of an Andrew Jackson or a Grover Cleveland in the White House![20]

While it is true that there may be a great deal of trouble in Brazil before the republic is established upon a firm basis, there is no probability of the re-establishment of the empire. The empire is a thing of the past, and the fact that little or no opposition has been made to the republic justifies the conclusion that there is no desire for the return of the deposed Emperor or any member of his family. There does not appear to be any good reason, therefore, for delay in recognizing the republic. Indeed, there are good reasons why there should be haste. Affairs in Brazil are now in a very chaotic condition, and there is a great deal of dissatisfaction with those who are exercising power. Recognition by this Government might help the true patriots to put the republic upon a firm foundation. Delay in extending recognition may encourage those who have no love for the republic, and who may be plotting for its ruin.[21]

Professing, as we Americans do, the utmost zeal and devotion to republican institutions, it would have been the most natural and graceful thing to have promptly recognized the new *regime* in Brazil, an act that would have greatly encouraged the patriots in that country and exerted a sobering effect on those European powers that have shown an inclination to interfere in behalf of the deposed imperial family.[22]

The people of Brazil, who desire to follow in the footsteps of the people of this country, have not received the slightest expression of sympathy from the United States, and they have no means of knowing whether they have the moral support of this country in their efforts to establish a popular government.[23]

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[20]The Indianapolis *Sentinel* (Ibid.), December 22, 1889.
[21]The Savannah *News* (Ibid.), December 22, 1889.
[22]The New Orleans *Picayune* (Ibid.), December 21, 1889.
[23]The Atlanta *Constitution* (Ibid.), December 19, 1889.

> It is both the duty and the interest of the United States to, in every legitimate way, encourage the new republic, and by its countenance, friendship, and influence to strengthen it in the confidence of its own people and in the respect of the world. Recognition would go far toward bringing about these desirable results, and it would undoubtedly have the very general and hearty approval of the American people.[24]

Among the journals which counseled moderation and delay were the Chicago *Herald*, the Philadelphia *Ledger*, the Macon (Ga.) *Telegraph*, the Washington *Star*, the Boston *Advertiser*, and the New York *Sun*. Space permits only very brief quotations from these.

> It would do no harm for the United States Senate to make haste slowly in the recognition of the new *regime* in Brazil. Sufficient time has not elapsed to permit the succession to attain stability or permanency. Unavoidably, affairs are yet in a more or less chaotic condition. . . This Nation has not forgotten the vexation which was caused by the proposed recognition of the Confederacy almost before the smoke had disappeared from the rebel gun which opened on Sumpter. The cases are not exactly parallel, although it is a fact that England had quite as much knowledge of the Confederacy as we have now of the Brazilian Republic, and no more. It would be miraculous if the scattered population of Brazil, with all its variety of blood, interests, and civilization, should pass from a monarchy to a republic without delay or disturbance.[25]

> It is well that the holiday recess of Congress brings Senator Morgan's rather too precipitate resolution for the recognition of the Brazilian revolutionary government to a halt till next month and next year, for by that time we may have some authentic information that will show us which is the right course to pursue. . . Before any measure of recognition should be finally acted upon by

[24]The Omaha *Bee* (Republican), December 19, 1889.
[25]The Chicago *Herald* (Democratic), December 23, 1889.

our Congress, we should have one or other of two things—either an official declaration of the real condition of affairs from the American Minister at Rio, that can be published for the information of the people of the United States; or unmistakeably vouched dispatches from the agents of the Associated Press at Rio Janeiro (sic), Bahia, Para, and Pernambuca—that the wires are open and free to all who wish to send or receive telegraphic messages. Till we have one or other of these assurances or something else in all respects equivalent, Congress should not move one step. It will be nothing better than taking a leap in the dark unless we have them. Instead of helping the people of Brazil to a good republican government such as we would wish to see them have, we may be helping to fasten upon them a *regime* of selfish and grasping military adventurers. . . Let us have at least a chance to look before we leap. The Brazilian people are not asking us to "hurry up."[26]

It seems to us that the Democrats of the Senate are making a mistake in insisting upon the immediate recognition of the Republic of Brazil. In fact, there is no such republic. The government in existence is a military despotism, much less liberal in character than the imperialism which the army overthrew. Under the old *regime* Brazil was governed by a ministry responsible to a Parliament elected by the people. The Emperor was not an active governing force. Under the new *regime* there is no Parliament, no representatives of the people, and the governing power is lodged solely in the hands of certain persons supported by the regular army. The old government was much more of a republic than the new, in spite of the fact that it had an emperor at the head of it. . . Our Government stands as the best example and defender of representative institutions, not of despotisms which may falsely call themselves republics. We can not afford to champion shams; it is our duty to support every genuine attmept to establish representative institutions.[27]

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[26]The Philadelphia *Ledger* (Independent), December 23, 1889.
[27]The Macon *Telegraph* (Democratic), December 23, 1889.

> The question is not whether the people of the United States sympathize with the new Republic of Brazil. It is a question of whether this government may recognize with entire propriety a government which the people of Brazil have not yet had the opportunity of approving or disapproving.[28]

> We can and do rejoice as a people at the signs of the daybreak of republicanism in Brazil, but our Government can not officially act until the people of Brazil have by their ballots freely and fully accepted the new order. No other course is consistent with that prudence and dignity which make recognition of some value when it is given.[29]

> Time, which tries all things, may be trusted to reveal the true inwardness of the Brazilian revolution. Nowhere on this earth is the establishment of a genuine republic so sure to be acclaimed with fervor as it is in the United States. But in our eyes the title of Republic is too sacred to be made the mask, decoy, and catchword of military usurpers.[30]

As a matter of fact, the Republican administration did not require much persuasion or compulsion. The Pan-American interests and sympathies of James G. Blaine who was then Secretary of State are well known. He was not the man to continue a policy of conservatism and caution when reports were current to the effect that other American states and even European countries were recognizing the new republic of Brazil. According, on January 29, 1890, while evidence of the disposition of the Brazilian people toward the revolutionary government must still have remained far from explicit and conclusive, formal recognition

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[28]The Washington *Star* (Independent), December 21, 1889.

[29]The Boston *Advertiser* (Republican), December 20, 1889.

[30]The New York *Sun* (Democratic), December 22, 1889. For a more complete survey of the press with reference to this matter, see *Public Opinion*, VIII (December 28, 1889), p. 279ff.

was extended to the agents of Brazil at Washington.[31] This step rendered a resolution of recognition on the part of Congress superfluous. Friends of the administration pushed through a joint resolution of congratulation, however, and this was presented to the provisional government on April 2, 1890, when the fate of the revolution was still far from certain.[32]

In fact, the overthrow of Don Pedro, as is well known, was followed by more than four years of intermittent disorders. The first president of the republic was overthrown by a faction in his own government, Congress was dissolved, and martial law was declared before the revolutionists had been in power a year. Subsequently the constitutional order was restored, but dissatisfaction was not completely overcome. Finally, in the late summer of 1893 a formidable revolt of the navy occurred. For a time it looked as if the government would be overthrown, but by the close of the following year the insurgents were subdued and Brazil entered upon the regime of orderly republicanism which she has been able to maintain to the present day.

During this period the United States was an interested, a sympathetic, and at times an uneasy observer. Not only was there anxiety to see the republican experiment succeed and the Brazilian people made happy by the achievement of more complete liberty and prosperity, but there was strong apprehension with reference to the possible interference of some of the nations of Europe. In the summer of 1890 the United States dispatched a small squadron southward with orders to make a "friendly visit" to Rio. Near the close of the year 1891 when fear of plots to restore the monarchy led to the dissolution of the Brazilian Congress and the proclamation of martial law, the executive department at Washington counseled moderation.[33] Later, after the revolt

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[31] John Bassett Moore, *A Digest of International Law* (Washington, 1906), I, 160-161; J. M. Cardosa de Oliveira, *Actos Diplomaticos de Brazil* (Rio, 1912), II, 162.

[32] *Papers Relating to the Foreign Relations of the United States* (1890), pp. 22-27.

[33] *Ibid.* (1891), p. 42; (1890), pp. 23-27.

of the navy had broken out and war-vessels of the leading European states appeared at Rio, the naval contingent of the United States in the region was effectively augmented, and there was considerable discussion of the Monroe Doctrine in the press.[34] In speaking of the situation at this time President Cleveland remarked:

> It appearing at an early stage of the insurrection that its course would call for unusual watchfulness on the part of our government, our naval force in the harbor of Rio de Janeiro was strengthened. This precaution, I am satisfied, tended to restrict the issue to a simple trial of strength between the Brazilian government and the insurgents and to avert complications which at times seemed imminent.[35]

No nation ever proved itself more deserving or more grateful for the kindly interest and profound sympathy of a friendly power than did Brazil. One of the first acts of the republican congress was the passage of resolutions of thanks to the United States;[36] one of the first important international agreements of the new government granted the United States valuable commercial concessions.[37] Exhortations to moderation which might have been resented, or cooly received, by a less broad minded or more sensitive government were accepted with utmost good faith. The Brazilian minister at Washington was directed to

> transmit to the President of the United States of America the expressions of gratefulness of the President of the United States of Brazil for the deep interest manifested for the new political institutions of this country. The moderation that he would advise is born in the character of the Bra-

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[34] *Ibid.* (1893), p. 45ff. See also, in connection with rumors of European sympathy with the insurgents, J. B. Moore, op. cit., VI, 439 and authorities cited; *Public Opinion*, VIII-XVI (1890-1894), index.

[35] J. D. Richardson, *Messages and Papers of the Presidents*, IX, 524.

[36] *Papers Relating to the Foreign Relations of the United States* (1891), pp. 50-51.

[37] *Ibid.*, pp. 43, 44, 46. *passim.*

> zilian people, in the sentiment and in the policy of its President, and has been practiced by his Government. The President acknowledges with great satisfaction that in this instance, as in so many others, the two republics find themselves in perfect accord. . .[38]

On April 15, 1892, in accordance with a previous agreement with the La Plata government, the President of Brazil requested the chief executive of the United States to serve as arbiter in the boundary question pending between these two Hispanic American republics;[39] July 4, 1894, was celebrated by an informal holiday and great pomp and ceremony in Rio de Jameiro; on November 15, following, the corner stone of the pedestal of a proposed monument to James Monroe was laid;[40] and in December, 1895, when news of Cleveland's stand with reference to the Anglo-Venezuelan boundary dispute reached the Brazilian capital, both houses of congress passed resolutions congratulating the government of Washington, while the Senate of the South American republic sent greetings and congratulations "to the Senate of the United States of America upon the worthy message of President Cleveland, who so strenuously guards the dignity, the sovereignty, and the freedom of the American nations."[41] The understanding between the two republics could scarcely have been more cordial and complete.

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[38] *Papers Relating to the Foreign Relations of the United States* (1891), p. 52.

[39] *Ibid.* (1892), pp. 17-19.

[40] *Ibid.* (1894), pp. 85-86, *passim.*

[41] *Ibid.* (1895), pp. 75-76.

NEWS AND NOTES[1]

ARGENTINA

The April elections throughout the country returned the Radical Party to power. Mercelo T. de Alvear, candidate for president, secured substantial majorities over the Conservative and Socialist candidates. At the same time Mr. Tomas Le Breton, Argentinean ambassador to the United States, was elected to the Senate from the Buenos Aires district; the ambassador resigned his post immediately after the announcement of his election.

The triumph of the Radical Party came as a surprise following the bitter opposition to President Irigoyen led by the most powerful faction of the press; but the election assures that party of another seven years in which to develop the program laid out by the preceding administration.

According to the latest census, Buenos Aires has a population of 1,700,000, this making it the second largest Latin city in the world.

The Government has sent several commercial agents to European capitals to study the meat market and the possibilities of developing the Argentinean meat industry.

A workers' convention made up of representatives from different cities recently met in Buenos Aires to discuss plans for the unification of all labor organizations.

The Government has authorized the Banco de la Nacion to make loans up to $50,000 nacionales each to land owners and to farmers holding not less than a five year lease.

Immigration, especially from Germany and Spain, is constantly increasing, more than 25,000 immigrants having passed through Buenos Aires in a single month.

BRAZIL

President Pessoa has vetoed the budget bill for 1922 as passed by Congress, basing his action on the grounds that

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[1]Prepared by the Editor of Latin-American Affairs.

an inflation of the budget would upset financial conditions in the country and that Congress had usurped executive privileges in dictating the establishment of certain positions. The veto has caused considerable discussion, the commercial circles generally supporting the President's attitude, while congressional leaders maintain that the president exceeded his authority in attempting to limit the action of the legislature.

The date of the closing of the international exposition celebrating the first centenary of Brazilian independence has been changed from November 15, 1922, to March 31, 1923.

San Paulo is the center of a rapidly growing steel and iron industry, which the Government is encouraging by a system of credits, by admitting free from custom duties machinery to be used in the industry, and by the use of large quantities of the product.

The State Departments of Argentina and Brazil have appointed a joint commission to find the quickest and best method of improving commercial relations between the two countries.

Responding to the action of the Mexican Government in appointing an ambassador to Brazil, the latter country has raised the rank of its diplomatic representative at Mexico City to that of ambassador.

An Institute for the Permanent Defense of National Products, with headquarters at Rio de Janeiro is being projected under Government sponsorship to help stabilize and encourage the distribution of Brazilian products both at home and abroad. The organization, which is to take the form of a limited company under official patronage, will be in charge of a council consisting of the Secretary of Agriculture, and five other members to be appointed by the President.

CHILE

Coastwise traffic has been reserved exclusively to ships carrying the Chilean flag. In accordance with the terms of the law which permits foreign companies having their main

offices in a Chilean port to engage in the traffic, several foreign companies have applied for nationalization.

Capitalists and shippers are cöoperating in an endeavor to create a permanent fruit trade between Chile and the United States, since the seasons alternate between the two hemispheres.

The Governments of Chile and Mexico have completed arrangements by which eight cadets in the military academies of the respective countries complete their training in the military schools of the other.

The fifth Pan-American Conference, scheduled to meet in Santiago in 1914 but postponed on account of the World War has been called to meet in the same city in March, 1923. Reduction of land armament has been suggested as one topic for discussion. It is possible that Canada may be asked to send a representative to the meeting.

A new political combination composed of the Centre, Moderate, Liberal, and Democratic parties and possibly supported by both Radicals and Conservatives, has produced a truce between the Executive and the Senate.

Delegates from Chile and Peru met at Washington on May 15 to inaugurate a conference whose purpose is to settle finally the Tacna-Arica controversy, long regarded as the most troublesome of all South American questions. The delegations have experienced considerable difficulty in their attempts to come to an agreement. Chile's position in general is that a plesbiscite is the only method of carrying out the Treaty of Ancon, and that its terms might be submitted to arbitration; while Peru maintains that a plebiscite held now would not fulfill the treaty and insists that the question of the holding of such a plebiscite should be submitted to arbitration.

COLOMBIA

With the exchange of ratifications of the treaty between the United States and Colombia according to the terms of which the former has undertaken to pay $25,000,000 to the latter for losses arising out of the secession of Panama, a

more cordial feeling has resulted between Colombia and Panama.

A syndicate of Belgian financiers has authorized a local banker of Bogota to take up contracts for the construction of several railroad lines; and a German company has entered into a contract to improve the navigation of the Magdalena River.

A shortage of funds in the treasury accompanied by a delay on the part of private interests to undertake an internal loan, has forced the issuance of an additional $500,000 in currency.

CUBA

Following a protest from Washington, the government has postponed until July 6 the sale of unclaimed merchandise in bonded warehouses. American firms have until that time to remove over $60,000,000 worth of goods sold to Cubans but not paid for; if they are not removed by the date mentioned, the goods will be sold for customs duties.

According to press dispatches dated June 10, the entire government is in the process of change to enable it to meet the conditions laid down by General Crowder. It is reported that President Zeayas and General Crowder are working in harmony in making changes designed to keep the island from bankruptcy.

EQUADOR

The failure of negotiations for a projected $25,000,000 loan to be handled by American bankers has shown the difference between the methods employed by American and European capitalists. The Americans required an exhaustive statement of the resources guaranteeing the loan, and refused to extend the loan on the ground that Ecuadorean legislation was too unstable. Experience seems to have demonstrated that European capital has more confidence in Latin-American countries than has American capital.

The centenary of the battle of Pichincha was widely celebrated on May 24, especial tribute being paid to the memory of Marshal Sucre to whom the success of the battle was largely due.

GUATAMALA

General Jose Maria Orellana, who overthrew the Herrera government last December and thus disrupted the Republic of Central America, has been elected constitutional president, by an almost unanimous vote. President Orellana soon after his election declared that Guatamala desired that relations both political and commercial between that country and the United States be as good as those which might exist between Guatamala and any other country.

The president has ordered the release of a number of political prisoners after a full investigation of their cases.

The new government was recognized by the United States on April 15. Francisco Sanchez Latour, former Secretary of Legation at Washington, has been appointed Minister.

HAITI

On April 11, Luis Borno, a prominent attorney and cabinet member, was elected by a unanimous vote of the legislature to succeed Sudre D'Artiguenave. The election has been protested on the grounds that Borno was constitutionally ineligible and that his government was sustained only by American forces.

MEXICO

The largest private land sale in the history of Mexico was announced on February 13 when arrangements for the transfer of 10,000 square miles to the McQuatters Corporation of New York were completed. The sale was forbidden by a proclamation of Governor Enriquez of Chihuahua in accordance with an announced policy forbidding the sale of land to foreigners.

President Obregon has announced his intention to start payment on Mexico's debt without awaiting the recognition of his government. An International Bankers' Commission, the American section of which is headed by Thomas W. Lamont of J. P. Morgan & Company, has been meeting with Secretary of the Treasury de la Huerta in an attempt to reach a settlement regarding Mexico's financial situation.

The Government has issued a decree relieving the owners of mining property from penalties for the failure to pay taxes during recently disturbed conditions, the remittal of penalties to be effective where the owners pay before July 1, the taxes assessed for 1921 and 1922 and agree to pay other arrears in installments.

The states of Puebla, Michoacaan, Tabasco, Vadillo, and Nuevo Leon have deposed their governors within the past few months.

The chief oil controversies between the Government and the most important oil companies operating in Mexico were settled at a conference held during the latter part of April at which the existing arrangements regarding export taxes were continued and a basis of valuation for production taxes was agreed upon.

According to a dispatch from Mexico City, President Obregon has ordered the suspension of the coinage of silver in order to forestall the discounting of silver money in favor of gold.

NICARAGUA

Extensive arrests have been made of members of the Liberal Party because of alleged revolutionary activities against the government of President Chamorro.

An American court-martial sitting at Manague sentenced twenty-six marines found guilty of engaging in a fight with Managuan police to terms ranging from eight to twelve years in prison. The verdict of the court completely stopped local resentment arising from the encounter.

PERU

Plans for the reformation of the police force along lines suggested by a commission from the Spanish Guardia Civil, which has come to Peru under contract with the Government, are under way.

Simultaneously with the conference for the settlement of the Tacna-Arica controversy, the Government has entered into negotiations with Ecuador for an exact settlement of the boundary between the two countries.

VENEZUELA

By a vote of Congress, General Juan Vicente Gomez has been elected President for the term extending from 1922 to 1929. General Gomez came into prominence in 1908 when he succeeded Dictator Castro. After serving as President for one year, the general reformed the constitution, and was elected President for the full period. After a lapse of an additional seven years during which Dr. Marquez-Bustillos has been President, General Gomez again returns to the presidential chair.

NEWS AND NOTES

Notes From Arkansas

PREPARED BY D. Y. THOMAS

University of Arkansas

VETO POWER.—That the governor has the right to veto a resolution by the legislature submitting an amendment to the constitution has just been denied by the supreme court.

The constitution, as interpreted by the supreme court, limits to three the number of amendments which may be submitted at one time, whether by the legislature, or by initiative. When the last legislature met two amendments had already been initiated. The first one passed by the legislature was the Hartje amendment subjecting personal property to taxation for improvements, such as roads. Governor T. C. McRae vetoed this in order that he might have a different amendment initiated.

I. C. Hopper, secretary of state, declined to recognize the governor's veto, whereupon court proceedings were instituted to restrain him from certifying out the Hartje amendment.

The supporters of the veto based their proceedings on that clause of the constitution which says that "every resolution" having the force of law must be submitted to the governor for approval, and upon an act of the legislature passed in 1879 conferring the veto power in cases of amendment.

So far as concerned the action of the legislature the constitution of 1874 merely said: "Either branch of the General Assembly at a regular session thereof may propose amendments to this constitution, and, if the same be agreed to by a majority of all members elected to each house, such proposed amendment shall be entered on the journal with the years and nays. . . ." The legislature of 1879, which

was the first to submit an amendment, elaborated on the procedure of the two houses in passing a resolution for an amendment and directed that it should be submitted to the governor and, if disapproved by him, passed over his veto before it should be submitted to the people.

J. S. Utley, attorney general, and his assistants, in defending the act of Secretary Hopper in refusing to recognize the veto, took the position that the legislative act of 1879 was merely interpretative, void, and of no effect. The fact that it had been followed ever since, even in case of resolutions for adjournment, which are specifically excepted in the constitution, made no difference, for usurpation of power was not rendered legal by long continuance. Besides, a part of the act bearing on the subject, though not affecting the veto, had already been declared void. They also pointed out that Governor Donaghey's veto of the ratification of the income tax amendment had been disregarded by the Federal authorities.

On the other contention counsel for the defense contended that the clause requiring "every order or resolution in which the concurrence of both houses of the General Assembly may be necessary, except on questions of adjournment" to be presented to the governor referred only to matters of a legislative character. Amendments to the constitution were not legislative in character, hence the governor's veto, which is a legislative power, did not apply to them. Numerous court decisions were cited to sustain this contention.

As already indicated the supreme court upheld the secretary of state in his refusal to recognize the veto.

FILLING VACANCIES IN THE LEGISLATURE.—For some time it has been the practice of governors in Arkansas to fill vacancies in the legislature by appointment. The constitution of 1874, still in effect, contains the following provision relating to such vacancies:

> The Governor shall issue writs of election to fill such vacancies as shall occur in either house of the General Assembly. Art. V, Sec. 6.

In 1836 the legislature passed an act to regulate the details of resignation from, and filling vacancies in, the legislature and this act is incorporated in Crawford and Moses' Digest (1921), Secs. 4962-5, as still in effect. This act says that the governor shall, "without delay, issue a writ of election to fill such vacancy" and directs how it shall be done. This seems to be all that is in the constitution and laws relating directly to the filling of vacancies in the legislature. However, there is a separate provision in the constitution relating to the filling of vacancies in office. This reads:

> When any office from any cause becomes vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have the power to fill the same by granting a commission, which shall expire when the person elected to fill said office, at the next general election, shall be duly qualified. Art. 6, Sec. 23.

In 1877 the legislature passed an act regulating the details of procedure in filling such vacancies. This act, which is incorporated in Crawford and Moses' Digest, Secs. 10333-8, quotes the article just given and adds:

> In any case wherein a vacancy in any office shall occur, to be filled, under the provisions of the Constitution, by a special election, the Governor shall have the power temporarily to fill the same by granting a commission, which shall expire when the person elected to fill said office, at such special election, shall be duly qualified.

This act was held constitutional in 1907 as affecting the right to fill a vacancy in the office of county judge and again in 1909 in the case of a circuit judge. Also, there are various other legislative provisions for filling certain specified state and local offices.

In consideration of the foregoing facts it is difficult to see where the governor gets any authority to fill a vacancy in the legislature by appointment. Art. 5, Sec. 6, is clear

and specific to the effect that he must call a special election. Even the power to fill the vacancy temporarily pending an election is not clear, for the act of 1877 giving such power is designed to supplement Art. VI, Sec. 23, which relates to offices, not to positions in the legislature. Besides, Art. VI, Sec. 23, specifically exempts positions otherwise provided for. Governors making the appointments do not seem to have considered that they were acting under this article and the law of 1877, for they have not called any special elections, considering the appointments final. In the same way were filled several vacancies in the constitutional convention of 1917-18.

Notes From Oklahoma

PREPARED BY MIRIAM E. OATMAN

Norman, Oklahoma

E. B. Howard of Tulsa and Hubert Bolen of Oklahoma City have withdrawn from the race for the Democratic nomination for Governor. This leaves Thos. H. Owen and J. C. Walton of Oklahoma City, R. H. Wilson of Chickasha and Tom O'Bryan of Haskell as candidates for the nomination. The avowed candidates for the Republican nomination are John Fields, Hugh Scott and George Healey. The candidates for minor state offices are unusually numerous this year in both parties.

Notes From Texas

BUDGET ESTIMATES CALLED FOR.—The first step in the preparation of the biennial State budget, 1923-25, has been taken by the State Board of Control, which has sent out the budget estimate blanks to the departments and institutions to be returned by July 1. The Board will visit the institutions and departments before making up the budget. The budget law requires estimates to be filed with the Board by September 15 and the printed budget must be ready by De-

cember 1. Experience with the first budget proved that this was too short a time in which to prepare the final budget, so the Board has asked that the estimates be sent in early, so it may complete its work by December 1.

QUALIFIED VOTERS NUMBER MORE THAN MILLION.—Returns from two hundred and fifty counties and an estimate as to another, show, according to the *Dallas News*, "that 1,013,835 citizens of Texas registered as 1922 voters in connection with the payment of poll taxes, as compared with 705,308 in 1920 and 624,568 in 1921. Adding to each of these numbers fifteen per centum thereof to cover exemptions, it is indicated that there are 1,165,910 qualified voters in Texas this year, as compared with 811,103 in 1920 and 682,964 in 1921."

The size of the woman vote is estimated to be over 300,000, being one-half of the total number in some counties. This is a great increase over 1920 and 1921. The registration fell off in 1921 because it was considered an "off" year.

REDISTRICTING ACT HELD VALID.—The Supreme Court has upheld the constitutionality of the redistricting act passed at the special session of the Legislature last summer. The act was attacked because Swisher County was omitted in the reapportionment, and on the ground that the voters were deprived of their right of representation in the Legislature.

The Court held that it was the intention of the Legislature to put Swisher County in the 120th District, and "that a legislative enactment will not be held unconstitutional and invalid unless it is absolutely necessary to so hold."

PERSONAL NOTES

Professor M. S. Handman will spend the summer in Europe, visiting Germany, Poland, and Roumania.

Professor A. B. Wolfe will give courses in sociology at Cornell University this summer.

A new appointment is that of Professor M. E. Gettys of Texas Christian University, as adjunct professor of sociology. He will continue the work established several years ago under the auspices of the Red Cross.

Mr. Vincent W. Lanfear has completed his general courses for the doctorate at Columbia University, and has been granted leave of absence for another year in order that he may serve at Yale University as an assistant professor of economics, while he is gathering material for his dissertation.

Professor Charles G. Haines has resigned to accept a proferrsorship of public law in the University of Texas. During the summer he will offer courses in the University of Southern California.

Mr. R. N. Richardson, instructor, has completed his graduate work in the University and has returned to Simmons College, Abilene, Texas.

Professor H. G. James has been granted leave of absence for 1922-23 to accept an appointment as research associate of the Carnegie Institution of Washington. He left in June for Brazil where he will remain for six months making a study of the government of that country.

In the absence of Professor James, Mr. Frank M. Stewart will act as editor in charge of the *Quarterly*.

Adjunct Professor C. P. Patterson will serve as chairman of the department for next year.

New instructors in the department for next year are: Ben F. Wright, Jr., tutor in government, who has spent the past year in graduate work at Harvard; Irvin Stewart, assistant in the government research division, who completed his graduate work this year; and Dr. M. W. Graham, who

has been instructor in the University of Missouri during the past year.

Professor F. F. Blachly of the University of Oklahoma will offer courses in the second term of the summer school in the University of Texas.

The general faculty of the University of Texas has approved the separation of the department of business administration from the College of Arts and Sciences and the establishment of a School of Business Administration. The question is now up to the Regents.

The Tenth Annual Convention of the League of Texas Municipalities was held at Waxahachie, Texas, on May 17-18. The most important question before the meeting was the question of the regulation of public utilities. No final action was taken upon the subject, but a committee of nine was appointed to study the entire question and report to a meeting of the league to be called by the president later in the year.

Officers elected were: E. R. Cockrell, mayor, Fort Worth, president; C. H. Fulwiler, mayor, Breckenridge, first vice-president; E. E. McAdams, city manager, Bryan, second vice-president; O. B. Black, mayor, San Antonio, third vice-president. The officers, with past President H. J. Graeser, city manager of Tyler, and executive Secretary Frank M. Stewart, constitute the executive committee.

Bryan was selected for the 1923 meeting place.

The May "Texas Municipalities" contained four tables giving the 1921 tax rates and taxable values for one hundred and fifty Texas cities.

Miss Gladys Dickason, for the past three years assistant secretary of the Oklahoma Municipal League, has been awarded a scholarship by Columbia University and will enter that institution for graduate work next fall. Miss Dickason received the B.A. degree from the University of Oklahoma this year.

Dr. Theodore C. Gronert, of the Texas College of Industrial Arts, has been elected professor of history and political science in the University of Arkansas and will enter upon his duties in the summer session.

BOOK REVIEWS

INMAN, SAMUEL GUY. *Problems in Pan-Americanism.* (New York, 1921. Pp. VII, 415.)

Of recent years there has been a marked increase of interest in the larger problems involved in the relations between the United States of America and the Latin-American states of this hemisphere. The World War contributed its important part in stimulating this interest on both sides of the Rio Grande. What is needed above all else at the present time is a sympathetic presentation of the Anglo Saxon point of view by Latin-Americans and of the Latin-American point of view by North Americans. The present volume is a worthy example of the latter type of presentation.

The work begins with an inventory of the assets and liabilities of Latin-America, physical, mental, and moral. The weaknesses, courteously termed problems, are presented from the point of view of prominent Latin-Americans, not merely the customary supercilious criticisms of the typical Anglo Saxon when estimating other nations and races. Strong as is the racial and national pride of the Latin-Americans, introspection and self criticism are by no means wanting on the part of prominent writers, as is clearly shown in this presentation of Latin-American problems.

Having laid the basis for a fair estimate of the merits and weaknesses of Latin-Americans and their states, the author then traces the development of Pan-Americanism from its earliest beginnings to the present time, showing the changes in attitude of Latin-America towards the United States and the developments that led to such changes. Especially interesting is the chapter devoted to the problems of the Caribbean countries, terminating in a group of suggestions for the future conduct of our relations with those countries.

Pan-Americanism versus Pan-Latinism is the title of a chapter that sets forth the two apparently opposing schools of thought that exist in Latin-America and shows how these principles can be reconciled in practice. The final chapter, dealing with the next steps in Inter-American friendship, summarizes the author's conclusions as to the solution of the problems in Pan-Americanism about which the whole work is concerned.

The book as a whole is a distinct contribution to the literature in English about our Latin-American neighbors. To the unfortunately large group of intelligent North Americans who are quite without information on the subject the work will serve as an excellent introduction to the field. To teachers of history and politics concerned in acquainting their students with the national characteristics of the Latin-Americans and their attitude towards the United States the book will prove of real value. Bibliographies at the end of each chapter and a general bibliography at the close enhance the value of the work for college classes.

University of Texas. HERMAN G. JAMES.

MATHEWS, JOHN MABRY. *The Conduct of American Foreign Relations.* (New York: The Century Co., 1922. Pp. 341.)

The increasing interest of the American people in world politics makes it desirable that they know how their own government conducts its foreign relations. This information is now available in adequate and accurate form for the first time. Some of the most illuminating chapters of Professor Mathews' book are those relating to the organization of the department of state, the personnel and procedure of diplomatic intercourse, the consular service, the theory and practice of the treaty-making power, the beginning and termination of war.

The book is not a chronological discussion of American foreign affairs, but a topical analysis, using historical events to illustrate principles and methods. In this respect, a departure is made in the direction of political science. Stu-

dents and teachers of government will welcome this change.

Professor Mathews shows how a real revolution has taken place in the conduct of foreign affairs in this country. The founders of the American system of government felt they were democratizing the treaty-making process as compared with Europe when they required the approval of treaties and diplomatic appointees by the senate. They pointed out at the time that European monarchs completely controlled the making of treaties and that this arrangement must be avoided in the American system. It has come about, however, that the American President, except in the rarest cases, has almost complete control of the treaty-making process in actual practice. It is now true that the constitutional duty of the President to enforce the laws of the nation is subordinate to his activities in world politics.

Professor Mathews' treatise will meet the demands of professors and lawyers for a carefully documented and authoriative discussion of the most important department of the American government. A series of such studies would make possible a needed volume on the American executive.

University of Texas. C. P. PATTERSON.

DAGGETT, STUART. *History of the Southern Pacific.* (New York: The Ronald Press Company, 1922. Pp. VI, 470. $5.00.)

This is a comprehensive, a scholarly, and a well written history of the Southern Pacific Railroad. It is a distinct contribution as a chapter in American history. The student desiring to know the facts of the development of the West cannot afford to neglect this book. Students of transportation, of business finance, and of government will find this to be among the most useful books.

Without showing bias, with directness, clarity and precision, Professor Daggett unfolds the history of the Southern Pacific from its inception, through the years of construction with the assistance of the Federal land grants and subsidies, through the story of the building of the Central Pacific, of the acquisition of the California Pacific, of the

building of the Southern Pacific; through the exploits of construction companies; through the years when the associates: Huntington, Stanford, Hopkins, Crocker, and their lieutenants were developing bold plans to achieve a monopoly in transportation in California and large stretches of the Southwest, when they conducted a great public utility as they would manage a retail store, when they opposed by all sorts of devices every effort at public regulation; through the controversies over the settlement of the indebtedness to the government; through an account of the merger cases— through all of this informing history down to the current oil and timber land litigation.

The unfolding of the story reveals how the public reacts to the character and the policies of the management. Even though the associates, the Huntington group, developed a great railroad system that was indispensable to California, their cold-blooded and consistent pursuit of their own interests awakened distrust, antagonism, and active opposition on the part of shippers and of the general public. A change in management has resulted in a change of policy, a disposition to co-operate with the regulating agencies set up by the public. The people have responded to the changes by giving evidences of good will instead of the old-time enmities.

University of Texas. W. M. W. SPLAWN.

EDIE, LIONEL D. *Principles of the New Ecnoomics.* (New York: Thomas Y. Crowell Company, 1922. 8vo. Pp. XIII, 525. $2.75 net.)

For several years an increasing number of critical students have been protesting against the methods and the conclusions of orthodox economists. Much of this criticism has been brilliant and stimulating. While a number of the younger writers have shown an apitude for destructive criticism, not many of them have undertaken to restate economic principles or to present a science of economics which would not be open to the objections they have raised in criticising the work of others.

Professor Edie has sought to organize with the aid of the criticisms of the most able and constructive of the "rebels," what he is pleased to call the "Principles of the New Economics." He divides the book into three parts: Part I, with four chapters on Economic Psychology; Part II, with Chapters V-X on Economic Institutions and Functions; and Part III with Chapters XI-XIII devoted to a discussion of Economic Adaptation.

After reading the book, the reviewer is of the opinion that there are two things in Professor Edie's treatment which may be called new, or at least different so far as general texts in economics go. The first is his industrious attempt to apply psychology in a discussion of general economics. In his second chapter, entitled "Economic Expression of Instincts," he mentions fifteen different instincts. In the third chapter he discusses the organization of human nature under the headings: habit, imitation, sympathy, suggestion, and inequalities of human equipment. He ends his treatment of Economic Psychology with the fourth chapter on human adaptation to economic environment, in which he speaks of discipline, elimination, sublimation, rationalization, and revolt. In these seventy-one pages of Part I, the reviewer gets the impression that the author is trying to teach a little psychology. Beyond question economists should know psychology, but wouldn't it be better for them to learn it from psychologists rather than from other economists?

The second thing that impresses the reader as new in this statement of general principles, is what it omits. There is no chapter on value. There are no such chapter headings as Rent, Interest, Wages, Profits. The discussions of production, of distribution, and of consumption, are jumbled together in a few chapters. Instead of a chapter analyzing the consequences of using the gifts of nature in producing goods, we find in chapter five considerable talk about such topics as machinery, transportation, chemistry, geology, electricity, and the psychology of industrial organization. While the factors of production are incidentally mentioned, labor alone is discussed as aiding in production. In chapter

seven on capital, there is little mention of capital's part in production, but quite a little is said about inequalities of distribution. The chapters on management and markets are interesting, but it seems to the reviewer that an intelligent reading of them presupposes a knowledge of the "old economics." Chapter ten is a lecture on the services and dangers of money and credit. The discussion of money is wholly inadequate. If this book is to be considered as representative, one may infer that the "new economics" will delete from text-books all study of the principles of money.

In Part III, under the head of Economic Adaptation, are interesting chapters on public control, radicalism and economic democracy. Part III, pp. 453-520, appears to be the best portion of the book.

There are two criticisms of the book which appear to be well founded: first the presentation is inadequate as a text in economics; second, the book is weak in its treatment of general economic principles. The first sentence in the book may be taken as an example of the attempts at definitions: "Economics is the science of human nature in its relations to the ordinary business of life."

If one were to make minor criticisms, mention would be made of the references found at the end of the chapters. These bibliographies may be arranged according to some principle, but if so, it is not apparent to the reader. Then too the reader would be aided if initials of authors were given in every case instead of in some cases, and if the year of publication were stated.

This book is to be welcomed as one which those interested in economics may read with pleasure and some profit. For reasons indicated above, the reviewer does not think that it will prove to be a satisfactory text for class use.

University of Texas. W. M. W. SPLAWN.

SHORT NOTICES[1]

FASSETT, CHARLES M. *Assets of the Ideal City* and *Handbook of Municipal Government.* Crowell, New York, 1922.

Kansas University's Specialist in Municipal Government has written two convenient-sized little books; one entitled *Assets of the Ideal City,* which has a foreword by Harold S. Buttenheim, the other entitled *Handbook of Municipal Government.* The former is a catalog of the essential functions of a well-governed city of today, with a brief statement regarding each. The latter is a summary of the essential facts of the development and structure of city government and its administration. Both books are the products of the author's close contact with the workings of a city as successful engineer, chamber of commerce president and mayor, supplemented by subsequent study and observation. They are intended for handy use by the business man, the club woman, and the municipal official, as well as for the college student.

CAPES, WILLIAM PARR. *The Modern City and Its Government.* New York: E. P. Dutton & Company, 1922. Pp. XI, 269.

The Modern City and Its Government is an attempt to boil down the usual viewpoints of student, critic and administrator into one. The author's long contact with these various viewpoints as Secretary of the New York State Conference of Mayors and Other City Officials has been a good preparation for this task. There are fourteen chapters, the first four of which deal with the general subject of

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[1]Prepared by Clara Trenckmann, Reference Assistant in the Government Research Division of the Bureau of Extension, University of Texas.

the modern conception and status of good government in relation to citizenship and public officials. The next two chapters deal with the election of city officials. Then comes a chapter on city charter-making, followed by a chapter on each of the three types of City government, the federal, the commission and the commission-manager, and a chapter entitled "Essentials of an Ideal Type of Government." A chapter on school administration and two chapters on the financial administration of cities complete the book. Fifteen charts showing the organization of typical cities are included in the book.